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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1588

FEDERATION FOR AMERICAN IMMIGRATION REFORM, *Et Al.*,

Appellants,

v.

PHILIP M. KLUTZNICK, *Et Al.*,

Appellees.

On Appeal From The United States District Court For The District Of Columbia

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

INTRODUCTION

Pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court, Appellants Federation for American Immigration Reform ("FAIR"), *et al.*[1] hereby sub-

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[1] Appellants are the Federation for American Immigration Reform, the Committee for Representative Government and 22 individual Appellants, members of the U.S. Senate and House of Representatives, as follows: Senators Walter Huddleston (Ky.) and John Heinz (Pa.); Representatives Burgener (Cal.), Findley (Ill.), Hyde (Ill.), Derwinski (Ill.), Clinger (Pa.), Goodling

mit this jurisdictional statement. This is an appeal from the February 26, 1980 order of a three-judge court in the United States District Court for the District of Columbia, denying a preliminary injunction and dismissing a complaint for injunctive and declaratory relief. This action was brought to prevent Appellees from including illegal aliens [2] in the 1980 decennial census enumeration used to reapportion the U.S. House of Representatives and more than 40 state legislatures and used to allocate $50 billion annually in federal assistance funds.

OPINION BELOW

The order and opinion of the three-judge court appear as Appendices ("App.") A and B, respectively, hereto. The order and opinion are not otherwise reported.

JURISDICTION

This action was initiated by a complaint for injunctive and declaratory relief filed December 5, 1979, alleging, *inter alia,* the unconstitutional apportionment of Congressional districts and statewide legislative

(Pa.), McDade (Pa.), Bailey (Pa.), Lederer (Pa.), Dougherty (Pa.), Yatron (Pa.), Gaydos (Pa.), Atkinson (Pa.), Myers (Pa.), Walker (Pa.), Murta (Pa.), Shuster (Pa.), Schultze (Pa.), Walgren (Pa.) and Jeffords (Vt.).

[2] The term "illegal alien" is used herein to denote non-citizens who may be considered "residents" for purposes of census enumeration but have no legal right to remain, work or reside in the U.S. absent a change in their legal status under the immigration laws. This includes those foreign nationals who entered this country in violation of the statutes governing entry or immigration to the U.S. and those who were admitted lawfully but thereafter remained in violation of the terms of their admission.

bodies. Various agencies of the United States and officers thereof were named defendants,[3] and the suit was brought pursuant to 28 U.S.C. §§ 1331(a) and 1337. On Appellants' motion, a three-judge court was convened pursuant to 28 U.S.C. § 2284(a).

The order of that court, denying Appellants' motions for preliminary injunction and summary judgment, granting Appellees' motions to dismiss or, alternatively, for summary judgment and dismissing the complaint for injunctive and declaratory relief, was issued on February 26, 1980. Notices of appeal of that order to this Court and the Court of Appeals for the District of Columbia Circuit were filed in the United States District Court for the District of Columbia on February 27, 1980. (The notice of appeal to this Court is included at App. C hereto.)

The jurisdiction of this Court to hear this appeal is grounded upon 28 U.S.C. § 1253. Authority sustaining this Court's jurisdiction is discussed in greater detail below.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., Art. I, § 2, cl. 1:

The House of Representatives shall be composed of Members chosen every second year by the People of the several States . . . .

[3] Named defendants (and Appellees herein) were Philip M. Klutznick, Secretary of Commerce; Vincent P. Barabba, Director of the Bureau of the Census; the Department of Commerce; the Bureau of the Census; the President of the United States; and the Clerk of the House of Representatives. The latter two parties were named on the basis of their statutory responsibilities in effectuating the nationwide Congressional reapportionment computed by the Census Bureau. *See* 2 U.S.C. §§ 2a(a), (b).

U.S. Const., Art. I, § 2, cl. 3:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.

U.S. Const., Amend. 14, § 1:

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., Amend. 14, § 2:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. . . .

Census Act, 13 U.S.C. § 141(c):

The officers or public bodies having initial responsibility for the legislative apportionment or districting of each State may, not later than 3 years before the decennial census date, submit to the Secretary a plan identifying the geographic areas for which specific tabulations of population are desired. Each such plan

shall be developed in accordance with criteria established by the Secretary, which he shall furnish to such officers or public bodies not later than April 1 of the fourth year preceding the decennial census date. Such criteria shall include requirements which assure that such plan shall be developed in a non-partisan manner. Should the Secretary find that a plan submitted by such officers or public bodies does not meet the criteria established by him, he shall consult to the extent necessary with such officers or public bodies in order to achieve the alterations in such plan that he deems necessary to bring it into accord with such criteria. Any issues with respect to such plan remaining unresolved after such consultation shall be resolved by the Secretary, and in all cases he shall have final authority for determining the geographic format of such plan. Tabulations of population for the areas identified in any plan approved by the Secretary shall be completed by him as expeditiously as possible after the decennial census date and reported to the Governor of the State involved and to the officers or public bodies having responsibility for legislative apportionment or districting of such State, except that such tabulations of population of each State requesting a tabulation plan, and basic tabulations of population of each other State, shall, in any event, be completed, reported, and transmitted to each respective State within one year after the decennial census date.

28 U.S.C. § 1253:

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or

proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. § 2284(a):

A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

Comprehensive Employment Training Act, 29 U.S.C. § 834(e):

No participant under this chapter shall be discriminated against by reason of citizenship. Participation shall be open to citizens and nationals of the United States, lawfully admitted permanent resident aliens, and lawfully admitted refugees and parolees.

Cal. Welf. & Inst. Code § 11104 (West):

Any alien who is otherwise qualified for aid shall be eligible to receive public assistance if he certifies under penalty of perjury that to the best of his knowledge he is in the country legally and is entitled to remain indefinitely, or if he certifies that he is not under order for deportation, or if he certifies that he is married to an individual not under order for deportation.

N.Y. Soc. Serv. Law § 131-k (McKinney 1979-80 Supp.):

1. Any inconsistent provisions of this chapter or other law notwithstanding, an alien who is unlawfully residing in the United States or who fails to furnish evidence that he is lawfully residing in the United States shall not be eligible for aid to dependent children, home relief or medical assistance.

2. An otherwise eligible applicant or recipient who has been determined to be ineligible for aid to dependent children, home relief or medical assistance because he is an alien unlawfully residing in the United States or because he failed to furnish evidence that he is lawfully residing in the United States shall be immediately referred to the United States immigration and naturalization service, or the nearest consulate of the country of the applicant or the recipients for such service or consulate to take appropriate action or furnish assistance.

QUESTIONS PRESENTED BY THE APPEAL

1. Whether 28 U.S.C. § 2284(a), as recently amended, requires that a three-judge court hear and determine (within the meaning of 28 U.S.C. § 1253) a Constitutional challenge to the manner in which the base, used for nationwide reapportionment of the House of Representatives and intrastate reapportionments in more than 40 jurisdictions, is constructed?

2. Whether illegal aliens in the United States are entitled to the same degree of representation in the U.S. Congress and statewide legislative bodies and the same share of federal assistance benefits as lawful residents of the United States?

3. If illegal aliens are not so entitled, whether including in the relevant legislative apportionment and fiscal allocation bases the large and geographically concentrated class of illegal aliens deprives lawful residents in areas with small or negligible illegal alien populations of the degree of representation and the share in federal assistance benefits guaranteed by U.S. Const., Art. I, § 2 and Amend. 14, §§ 1 and 2?

4. If the inclusion of illegal aliens does work to deprive those lawful residents of such rights, whether such lawful residents (and/or a group of lawful residents from all 50 states) have standing to complain of that dilution or deprivation of their rights prior to completion of the reapportionment and allocation process?

5. Whether the Census Bureau's decision to include illegal aliens without differentiation from lawful residents in the 1980 census enumeration and all legislative apportionment and fiscal allocation bases derived therefrom is arbitrary, capricious and an abuse of discretion within the meaning of the Administrative Procedure Act, and should have been enjoined?

STATEMENT OF THE CASE

The decennial census required by the terms of the U.S. Const., Art. I, § 2 is the basis for the decennial reapportionment of the U.S. House of Representatives and reapportionment of Presidential Electors. U.S. Const. Art. II, § 1, cl.2. Population data from the decennial census must also be used by more than 40 states for reapportionment of Congressional districts and statewide legislative bodies. In addition, decennial census data are the principal determinant of the funds allocated to state and local governments by the terms of more than 100 "census-based" federal assistance programs that now contribute $50 billion annually to state and local social welfare and community development efforts.

This controversy arose due to the phenomenon of illegal immigration to this country and the unprecedented effort of the Census Bureau to promote participation of illegal aliens in the 1980 census. Evidence submitted by the parties in the proceeding below included assessment of the principal demographic studies on illegal immigration. These data show without material dispute that: (a) in the last decade, there has been an unprecedented influx of illegal aliens to this country; (b) the Census Bureau itself concedes that, by 1978, there were between 3.5 and 6.0 million illegal aliens in this country, and a continuing growth of this population since that time; (c) the illegal alien population is highly concentrated (more than 80 percent) within fewer than ten states; and (d) this population is further concentrated within the urban areas of those states.

It is also undisputed that Appellees planned the conduct of the 1980 census to include this class in all the population data derived from the census. With the aid of other federal agencies and departments, Appellees have undertaken a major, unprecedented promotional effort aimed at prompting census responses by illegal aliens, and have in place and under consideration several internal programs by which preliminary census data will subsequently be adjusted to correct for "undercounts," particularly in geographic areas that include large numbers of illegal aliens. At the same time, however, Appellees have developed no means to separate illegal aliens from lawful residents in the census data used for the nationwide reapportionment of Congressional Representatives and reapportionment of more than 40 state legislatures. Additionally, the illegal alien population will be included without differentiation in the data by which allocations under the federal census-based assistance programs will be awarded. Because of its nature as a decennial

census, the legislative and fiscal apportionments in question will prevail for the next decade.

The individual Appellants are members of the U.S. Congress, who brought suit in their capacity as lawful residents, registered voters and taxpayers in states with small illegal alien populations or states with large such populations but areas thereof with small numbers of illegal aliens. Appellants FAIR and the Committee for Representative Government brought suit on their own behalf and on behalf of their members, currently including lawful residents, taxpayers and voters in all 50 states. Appellants (hereinafter referred to collectively as "FAIR") on December 5, 1979 filed an action for injunctive and declaratory relief on their own behalf and on behalf of their members and others similarly situated. FAIR alleged that the conduct of the 1980 census and apportionment process would result in the disproportionate allocation of representation in the U.S. Congress and state legislatures as between lawful residents (such as Appellants) in jurisdictions with small illegal alien populations and lawful residents in localities with large illegal alien populations. FAIR further alleged that the planned conduct of the 1980 census would similarly skew allocation of federal funds from the "census-based" assistance programs, and that the Census Bureau had abused its discretion in planning to conduct the 1980 census in this manner. FAIR sought injunctive relief to prevent the undifferentiated inclusion of illegal aliens in the legislative apportionment and fiscal allocation bases derived from the census. FAIR also sought a declaratory judgment that the undifferentiated inclusion of illegal aliens in those bases violated the rights guaranteed the various Appellants and their members by U.S. Const., Art.

I, § 2 and Amend. 14, §§ 1 and 2, and was arbitrary, capricious and an abuse of discretion within the meaning of section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706.

On FAIR's motion pursuant to 28 U.S.C. § 2284(a), a three-judge court was convened, to which court FAIR on December 21, 1979 applied for issuance of a preliminary injunction against conduct of the census absent the above-noted provisions. On January 9, 1980, Appellees Klutznick, *et al.* (hereinafter collectively referred to as the "Census Bureau") responded to that application and also submitted a motion to dismiss or, in the alternative, for summary judgment, on grounds that FAIR had failed to state a claim for which relief could be granted and/or that FAIR lacked standing to maintain the action. Appellees State of New York, *et al.* (hereinafter collectively referred to as "New York") moved to intervene and filed a similar motion to dismiss. FAIR replied to those motions and submitted a cross-motion for summary judgment. On February 7, 1980, the three-judge court heard argument on all the pending motions and applications, and on February 26, 1980 issued an order and opinion.

The court found that all the various Appellants lacked standing with respect to their claims of Congressional malapportionment. In the court's view, no party could, before the reapportionment process was completed, do more than "speculate as to which states might gain and which states might lose representation." App. B at 13a. While agreeing that the inclusion of illegal aliens would cause some shift in Congressional apportionment, the court concluded that "*none* of the Plaintiffs are able to allege that the

weight of his or her vote in the next decade *will be affected by* the expected method of taking the census and apportioning Congressional seats." *Id.* (emphasis in original). The court further ruled that all Appellants lacked standing with respect to intrastate malapportionments because the states were free to construct their apportionment bases in this fashion and because the Census Bureau "do[es] not have the power or authority to dictate to the states how they should apportion themselves." App. B at 14a, n.11. The court also denied standing to any of the Appellants on their claims of the discriminatory administration of the census-based assistance programs, ruling that no appropriate challenge to any specific programs had been presented. App. B at 12a, n.9. The court also denied standing with respect to FAIR's Administrative Procedure Act claims. *Id.* at 11a, n.8.

The court then proceeded to assess, in terms adverse to FAIR, the equities bearing on its request for injunctive relief and the merits of its underlying Constitutional claims. App. B at 24a-28a. The three-judge court further found "that the issue is most likely one for a single district judge." *Id.* at 28a. Noting concurrence in the panel's opinion by the single district court judge to whom the action was first assigned, it adopted the procedure previously employed in *Swift & Co.* v. *Wickham,* 382 U.S. 111, 114, n.4 (1965), in dissolving the three-judge court. App. B at 29a. The three-judge court thereupon entered an order denying FAIR's motions for a preliminary injunction and summary judgment, granting the Appellees' motions to dismiss and for summary judgment, and dismissing the action.

FAIR on February 27, 1980 filed notices of appeal both to this Court and the Court of Appeals for the

District of Columbia Circuit,[4] and on February 28 filed with the district court an application for injunction pending appeal. That application was denied the next day [*see* App. D], and, on March 4, 1980, FAIR applied to the Chief Justice of this Court, as Circuit Justice, for an injunction pending appeal. That application was referred to the full Court, which on March 17, 1980 denied the application.

THE QUESTIONS ARE SUBSTANTIAL

This proceeding raises fundamental questions—that will persist for the next decade—concerning substantive rights in representative government and the distribution of federal assistance benefits. This case also poses substantial questions of the criteria for standing and the role of three-judge courts in apportionment cases, as well as the scope of this Court's appellate jurisdiction.

Three-Judge Court And Appellate Jurisdiction

This is the first case involving the three-judge court statute as it was extensively amended in 1976. That statute was first enacted in 1910[5] and grew out of a conflict between early state regulatory enactments and their invalidation by federal district courts on "substantive" due process grounds.[6] This conflict led first to efforts to curb federal jurisdiction in this area, but

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[4] Notice of appeal was filed in the Circuit Court on a protective basis, and that court has stayed further proceedings pending disposition of the matter before this Court.

[5] Act of June 18, 1910, c.309, § 17, 36 Stat. 557.

[6] *See generally Swift & Co.* v. *Wickham,* 382 U.S. 111, 117-118 (1965).

eventually took the form of a statutory requirement that a panel of three judges (one of whom was to be a circuit judge) hear injunctive actions to restrain the enforcement of state laws on Constitutional grounds. That statute further provided for direct appeal to this Court from a final or interlocutory judgment of a three-judge panel.

The 1948 revision of the Judicial Code carried the direct appeal provision forward in 28 U.S.C. § 1253 and the operative section of the three-judge court statute in 28 U.S.C. § 2281. This latter provision was jurisdictional in nature and, in order properly to convene a three-judge court, required that: (1) the action be one for an interlocutory or permanent injunction; (2) the action name a state officer; and (3) the action seek to restrain on substantial Constitutional grounds the officer's enforcement of a state statute.[7]

Subsequent decisional law significantly minimized the conflict which had led to this preventive measure against the improvident invalidation of state laws. However, the three-judge court statute remained in effect and generated an increasing number of such proceedings. The demand such cases placed upon the federal judiciary and this Court's docket led to both a narrow construction of §§ 1253 and 2281 and calls for

[7] Section 2281 provided:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

repeal of the three-judge court statute. Congress enacted such legislation in 1976,[8] with the stated aim of reducing the class of cases required to be heard by three-judge courts and eliminating the procedural complexities growing out of the construction placed upon the jurisdictional and appellate provisions of §§ 1253 and 2281.[9]

Section 2281 was therefore repealed in its entirety and replaced by 28 U.S.C. § 2284(a), requiring a three-judge court only "when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of Congressional districts or the apportionment of any statewide legislative body." Apart from the small number of statutes expressly calling for three-judge courts,[10] Congress maintained this one non-statutory class of cases for resolution by such panels because of the fundamental Constitutional questions raised in apportionment cases.[11] At the same time, Congress revised or

[8] Pub. L. No. 94-381, 90 Stat. 1119.

[9] *See generally* S. Rep. No. 94-204, 94th Cong., 2d Sess., at 6-7 (1975) (hereinafter "S. Rep. No. 94-204"), reprinted at 1976 U.S. Code Cong. & Admin. News 1993-94.

[10] Three-judge courts are required in actions under Sections 4(a), 5(a) and 10 of the Voting Rights Act of 1965, 42 U.S.C. § 1973b(a), 1973c and 1973h(c). Such courts may be convened in actions under the voting provisions of the Civil Rights Act of 1964, 42 U.S.C. § 1971g, and may be convened upon the request of the Attorney General under the public accommodations and equal employment provisions of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-5(b), 2000e-6(b). *See generally* H. Rep. No. 1379, 94th Cong., 2d Sess., 6 (1976).

[11] *See, e.g.*, S. Rep. No. 94-204, *supra* note 9, at 9 ("The bill preserves the three-judge courts for cases involving congressional reapportionment or the reapportionment of a statewide legislative

eliminated the jurisdictional requirements of § 2281. Three-judge courts are thus required to hear any action, rather than one for injunctive relief, challenging the Constitutionality of legislative apportionment, and § 2284(a) no longer requires that a state official be named a party in the context of his enforcement of a particular state statute.

This case squarely raises a Constitutional challenge to the first and most basic step of the apportionment process—construction of the numerical base from which legislative representation is to be distributed. The lower court took the view that three-judge courts were appropriate only to a challenge concerning the boundaries of particular districts. Citing a Senate report for a predecessor bill that was never enacted, the court held that the statute did not "cover cases such as this which do not directly affect state reapportionment," and interpreted the 1976 amendment to continue the requirement that three-judge courts hear only challenges to "state action reapportioning congressional districts." App. B at 28a-29a. The lower court's opinion, however, overlooks the direct impact the census has on local reapportionment in more than 40 states and is devoid of any analysis of the legislative history demonstrating Congress' clear intent to retain three-judge courts "in *any* case *involving* congressional reapportionment or the reapportionment of any statewide legislative body." [12]

body because it is the judgment of the committee that these issues are of such importance that they ought to be heard by a three-judge court and, in any event, they have never constituted a large number of cases.").

[12] S. Rep. No. 94-204, *supra* note 9, at 1 (emphasis added) ("However, three-judge courts would be retained when specifically required by act of Congress or in any case involving congressional reapportionment or the reapportionment of any state-wide legislative body.").

This proceeding thus presents the substantial question of whether three-judge courts can properly hear cases concerning only election districts already reapportioned in an unconstitutional manner, or whether the 1976 amendment should properly be construed to require consideration by a three-judge court of a Constitutional challenge to the more fundamental steps in the reapportionment process.

This case also bears substantively upon this Court's appellate jurisdiction pursuant to 28 U.S.C. § 1253, providing for appeal to this Court "from an order granting or denying . . . an interlocutory or permanent injunction in any . . . proceeding required by any Act of Congress to be heard and determined by a district court of three judges." The order now before this Court is one entered by the three judges convened below, denying both interlocutory and permanent injunctive relief, and, as indicated above, was issued in a proceeding where a three-judge court should have been convened. While this case thus comes within the literal terms of § 1253, the Census Bureau and New York have previously argued that precedent under the former three-judge court statute should here by applied to leave this Court without jurisdiction over the appeal.

This case is distinguishable on its own terms from such decisions as *Gonzales* v. *Automatic Employees*

Credit Union,[13] *MTM, Inc.* v. *Baxley*,[14] and *Wilson* v. *City of Port Lavaca*[15] by reason of the fact that the three judges below considered not only FAIR's standing but also the merits of the Constitutional claims [*see* App. B at 24a-28a], and collectively entered a final order dismissing FAIR's complaint for permanent injunctive relief. More importantly, however, this case is the first to arise under the three-judge court statute as it was amended in 1976 to obviate the factors that necessitated the narrow construction placed on § 1253 in decisions such as those cited above.

The Court has noted that, in "struggling to make workable sense of [the former three-judge court statutes] the Court has not infrequently been induced to retrace its steps" [16] in constructing the framework of § 1253 appellate jurisdiction. Those efforts resulted from both "the opaque terms and prolix syntax" [17] of the existing three-judge court statutes and the proliferating number of cases arising thereunder, with the consequent tax upon judicial resources and this Court's docket. Appellants do not request that the Court again retrace the jurisdictional path through those considerations, for the reason that Congress has already responded to them. Section 2281 and its convoluted phraseology have been repealed. It has been replaced

[13] *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90 (1974).

[14] *MTM, Inc.* v. *Baxley*, 420 U.S. 799 (1975).

[15] *Wilson* v. *City of Port Lavaca*, 391 U.S. 352 (1968).

[16] *Gonzalez* v. *Automatic Employees Credit Union, supra*, 419 U.S. at 95.

[17] *Id.* at 96-97.

by a provision that unambiguously calls for three-judge courts under the terms of just the two statutes expressly requiring them *and* in apportionment cases, the latter without the narrow jurisdictional limitations that were a part of § 2281.

To employ the narrow construction applied in previous rulings on the repealed statute would frustrate Congressional intent. In enacting the 1976 amendments, Congress was fully aware that three-judge courts had outlived their original purpose. Yet, Congress deemed apportionment cases to be of such Constitutional significance to warrant their continued consideration by such panels, with direct appeal to this Court. Accordingly, both the propriety of a three-judge court in apportionment cases and the scope of this Court's appellate jurisdiction must be assessed in light of the terms and purposes of the 1976 amendments. This case raises substantial questions of first impression on both aspects, resolution of which by this Court is necessary to determine the instant and prospective application of 28 U.S.C. §§ 1253 and 2284(a).[18]

The Rights Secured By Article I, § 2 And Standing To Vindicate Them

The Constitutional question presented is a straightforward but fundamental one: who are "the People of the several States" secured by Article I, § 2 in the right of equal access to representative government?

[18] Alternatively, should the Court find that it does not in this proceeding have jurisdiction on a direct appeal, Appellants request that the Court take jurisdiction of this action pursuant to 28 U.S.C. §§ 1254(1) and 2101(e) by considering this jurisdictional statement as a petition for certiorari before rendition of judgment by the Court of Appeals.

The questions of standing are equally basic, *i.e.*, must a group of those "People" await a dilution of that right before seeking redress, and can an opportunity to seek that relief be denied in the first instance because of an asserted difficulty in fashioning a remedy?

The Right Of Equal Access And "The People" To Whom It Is Secured

The "one person, one vote" rule developed in this Court's reapportionment decisions is a shorthand way of stating the concept that the Constitution requires that every member of the body politic be afforded an equivalent degree of access to legislative government. *Kirkpatrick* v. *Priesler,* 394 U.S. 526, 531 (1969). Because all constituents—both voters and non-voters —have the same vital interest in government, any apportionment scheme giving a greater degree of legislative access to certain constituents is Constitutionally impermissible, no matter how small an otherwise avoidable deviation from equality of representation. *Reynolds* v. *Sims,* 377 U.S. 533, 563 (1964).

While cast interchangeably in terms of equal representation for equal numbers of "persons," "voters," and "citizens," the reapportionment cases called for the use of aggregate population data as the base from which representation was to be equitably distributed. Implicit in such use of a "total population" base, however, is the assumption that it accurately reflects the number of constituents properly accorded an equivalent degree of representation. The influx of illegal immigrants in the decade since the last national apportionment base was constructed and the Census Bureau's view that illegal aliens must be included in that base brings the validity of this most fundamental assumption of the reapportionment cases directly into question. Resolution of this question requires inquiry of the underlying Constitutional purposes, in a context with which the Framers had no familiarity.

Article I, § 2 mandates that Congressional Representatives "shall be . . . chosen . . . by the People of the several States . . . ." In seeking to effectuate this "Great Compromise" of popular representation in one house of the national legislature, the Framers sought a means to ensure that equal numbers of "the People of the several States" would be afforded equal legislative representation. The means they chose was a decennial reapportionment of the House, based on a census. The manner in which the 1980 census and reapportionment will be conducted prompts the fundamental Constitutional question: who are "the People of the several States" secured by Article I, § 2 and the decennial reapportionment process in the right of equal representation?

The question cannot be resolved by the literal terms of Article I, § 2. In their obvious reference back to "the People *of* [not *in*] the several States" in calling for a census of the "whole number of persons in each state," [19] the Framers and the 39th Congress could

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[19] Article I, § 2 originally provided that "Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons." The abolition of slavery required revision of this formula, now set out in § 2 of the Fourteenth Amendment which provides: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed."

not have meant to confer equal representation upon any and all "persons" simply by reason of their physical presence in some state during the enumeration. This is implicit in the history of the census itself.

The Census Bureau readily concedes that, since the first census in 1790, it has devised the enumeration to differentiate those "persons" physically present from those secured representational rights. Plainly, there has never been an enumeration of the "whole number of persons in each state" as of census day. The Census Bureau, by two hundred years of unbroken practice, has, for example, excluded entirely all diplomats and foreign nationals temporarily in the country. Other proper constituents (*e.g.*, U.S. diplomatic and military personnel overseas and citizens travelling in other parts of the country) have been counted in one place and allocated back to their various jurisdictions of residence. In each case, the Census Bureau has chosen criteria that best fit the Constitutional purpose of the census.

Constitutional purposes must here be considered to determine whether foreign nationals, illegally present in the U.S. on census day, are to be numbered among the people of the United States secured by Art. I, § 2 in the equal distribution of political rights. The Framers and the 39th Congress had no need for greater specificity since the new nation for the first century of its existence welcomed all non-citizens without restriction. In 1875, however, Congress enacted the first immigration laws, based on a recognition that this nation is unable to absorb without restriction all those citizens of foreign countries seeking residence here. Our laws currently place no limit on the number of

foreign nationals who may enter this country temporarily, but there are both qualitative conditions and quantitative limits that any foreign national must satisfy before legitimately claiming the status of lawful permanent resident.

The citizens of the United States, as a sovereign people, have through the immigration laws thus exercised their inherent right to determine who may become part of "the People of the several States." No foreign national can secure a right of residence here except by meeting the terms of those laws. Nor can a foreign national claim a right to representation but through compliance with those laws.

To argue, as the Census Bureau and New York did below, that the Constitution *requires* that illegal aliens be afforded such representation not only clashes with the notion of the United States as a sovereign entity but also with this Court's prior decisions. The Court has stated that none of its reapportionment decisions even "suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed . . . ." *Burns* v. *Richardson*, 384 U.S. 73, 92 (1966). The Court proceeded to state that "[t]he decision to *include or exclude* any such group involves choices about the nature of representation," prompting Constitutional inquiry as to the validity of the choice made. *Id.* (emphasis added). The Court there found no Constitutional impediment to excluding entirely from the apportionment base a sizeable and geographically concentrated class of non-citizens, the terms of whose presence left them without any

legitimate claim to the representation distributed from that base.

It is Respondents' administratively taken and all-*inclusive* "choice about the nature of representation" vis-a-vis illegal aliens that raises the fundamental Constitutional issue FAIR asks this Court to resolve.

The court below isolated the phrase "whole number of persons" from the context of Article I, § 2, stating that illegal aliens are "persons" and concluding that the Framers must have intended their inclusion in the apportionment base. App. B at 25a. The court went on to refer to subsequent legislative consideration of including *legal* aliens in the apportionment base, a discussion irrelevant to the status of *illegal* aliens and the fact that this status was unknown either to the Framers or the drafters of the Fourteenth Amendment. This Court has, moreover, clearly stated the impropriety of adopting such a wooden interpretation of the words in the Constitution when dealing with the application of its broad principles to matters with which the Framers had no familiarity. *See, e.g., United States* v. *Classic,* 313 U.S. 299, 316 (1941).[20]

Additionally, the lower court recognized the applicability at the national level of the Constitutional prin-

[20] The wisdom of this interpretive rule is underscored by the fact that the lower court's literalistic approach to appearance of the term "persons" in the Constitution is an invitation to bestow on illegal aliens, by simple reason of their presence here, rights and privileges they cannot rationally be accorded. For example, the court's analysis could compel the conclusion that the federal government and many states "deny to . . . person[s] within [their] jurisdiction the equal protection of the laws" [U.S. Const. Amend. 14, § 1] by the score of federal and state statutes that make otherwise qualified "persons" ineligible for social assistance because they enter or remain in this country unlawfully.

ciple of equal access to representative government, but dispensed with it as merely "a rough goal" in national reapportionment. App. B at 27a. That cursory explanation ignores this Court's repeated admonition that the fundamental nature of the right in question admits of no deviations from *absolute* equality save those that are compellingly justified as unavoidable. *See, e.g., White* v. *Weiser,* 412 U.S. 783, 790 (1973).

Accordingly, the question presented on appeal is both one of first impression and strikes directly to the nature of representative government as it is Constitutionally secured the people of the United States.

Standing

The fundamental error of the lower court's standing analysis is its misconception of the right FAIR seeks to protect. While finding the gravamen of the complaint to be that "some one or more of [Appellants] will likely suffer the loss of at least one national or state representative" [App. B at 11a], the court failed to consider FAIR's repeated claim that what Appellants will suffer is a loss of equal access to the process of representative government at the state and national level.

It is undisputed that the Census Bureau will construct the apportionment base upon which that representation is distributed to include a large, geographically concentrated number of illegal aliens. For purposes of standing, it must be assumed that illegal aliens cannot lay claim to that representation. It must also be assumed that both national and state legislatures will, consistent with Constitutional requirements, be apportioned on the basis of equal representation for

equal numbers of those included in the apportionment base. What FAIR alleged and proved is that including in the base used for national and intrastate apportionment a geographically concentrated number of persons not entitled to representation affords lawful residents (like the various Appellants) of localities having small numbers of illegal aliens disproportionately less access to whatever legislators they are apportioned than a like number of lawful residents "advantaged" by proximity to a concentration of illegal aliens.

The court below limited its standing analysis to the "speculative" projections of nationwide reapportionment undertaken by FAIR's witnesses, but these were offered to demonstrate the magnitude of the impact the Census Bureau's actions will have on that process, *not* as the sole basis of the injury alleged. Whether Kentucky, Pennsylvania or any other state gives up one or more Congressional seats to California is immaterial. The injury here to result is that the lawful residents of certain areas in California (and certain areas of the other states with concentrations of illegal aliens) will unquestionably receive a degree of access to Congressional Representatives disproportionately greater than that afforded the lawful residents (like the various Appellants) of the remaining areas of those states and all other states with relatively smaller illegal alien populations.[21]

Standing to allege this injury requires only a showing that a geographically concentrated class of those

[21] Similarly, whether a number of state legislators is reapportioned to Chicago from downstate Illinois is immaterial to the injury resulting from the fact that like numbers of lawful residents in those areas will be afforded a dissimilar degree of access to their representatives in the state legislature.

not entitled to representation will be included in the apportionment base, and that the complaining party is a lawful resident of a locality having a small or negligible population of that class. Despite FAIR's analysis of this concept during the proceeding below, it finds no consideration in the lower court's discussion of standing.[22]

Relying on *Duke Power Co.* v. *Carolina Environmental Study Group,* 438 U.S. 59, 74 (1978), the lower court also found that FAIR lacked standing because Appellants "failed to demonstrate that the relief they seek will redress the injury they assert." App. B at 20a. The court's view was premised on its assessment that *one* of but several remedies suggested by FAIR would not be sufficiently effective [*id.* at 20a-21a] omitting any discussion of the other alternatives advanced

[22] Further, on the lower court's own terms, Appellants did establish their standing to complain of "the loss of at least one national or state representative." The court correctly noted that, for standing purposes, it must assume the Constitution requires exclusion of illegal aliens from the apportionment base and that the Census Bureau's failure to do so "will result in the misallocation of from one to sixteen seats in Congress." App. B at 12a. But the court held that the resulting injury to this group of litigants was insufficient by reason of the fact that they could "do no more than speculate as to which states might gain and which might lose representation," although recognizing that at least one state would lose (and another gain) a seat. *Id.* at 13a. Appellants, however, currently include among their number litigants *from all 50 states. See* Affidavit of Roger Conner, Executive Director of FAIR, included as Attachment E to the appendix of attachments accompanying FAIR's March 4, 1980 application for injunction pending appeal. Given the necessary assumption of some misallocation of Representatives, the fixed total of 435 Representatives necessitates that misallocating one Representative to the lawful residents of but a single state means that the lawful residents of some other state, perforce including at least one Appellant, will be deprived that Representative.

during the proceeding. Moreover, in *Duke Power Co.*, this Court's analysis of standing was whether there existed a "but for" causal connection between the actions complained of and the harm alleged. *See* 438 U.S. at 74-75. The appropriate inquiry on standing is not the feasibility of a particular remedy or the best means to fashion other relief, but whether the injury to result absent *some* remedy "fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). Such a causal connection is here unquestionably present, and we are aware of no decision that denied standing because of perceived logistical difficulties in fashioning a remedy.

The lower court conceded that its analysis effectively denied standing to any litigants protesting a dilution of their right of equal representation prior to completion of the reapportionment process. *See* App. B at 21a. The court's suggestion of post-census litigation of the issue [*id.* at 22a-23a] is, however, ill-considered not only in its misconception of the injury here alleged but in its invitation to restrict resolution of such issues to the post-apportionment context. Effective relief at that point can require invalidation of the outcome of that process, rather than an adjustment to a process not yet implemented. Accordingly, the lower court's rule of standing in apportionment cases not only overlooks the nature of the right in question but would also result in a limitation on judicial authority causing the needless disruption and delay of the apportionment process itself.

THE DISCRIMINATORY ADMINISTRATION OF THE CENSUS-BASED ASSISTANCE PROGRAMS

Over the decade since the last census, Congress has created more than 100 programs of financial assistance to state and local jurisdictions. Proceeding from the Congressional purpose of ensuring the most equitable distribution of these funds throughout the United States,[23] each of those programs prescribes the use of census data on the population as a whole or a particular segment of it as the principal factor in their allocation formulas. More than $50 billion was appropriated for these programs during the current fiscal year, and these funds are a vital aspect of state and local efforts at community development, elementary, secondary and vocational education, job training, delivery of health services, environmental protection and conservation, development of transportation systems, and social assistance for the needy.

Including several million illegal aliens in the data upon which allocations under all of these programs are based will unquestionably cause increased grants to those localities in which that population is concen-

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[23] *See, e.g.*, Staff of the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service, 95th Cong., 2d Sess., The Use of Population Data in Federal Assistance Programs (Comm. Print 1978). This comprehensive report describes each of the census-based assistance programs and their respective allocation formulas. It also explains that "[p]opulation, which is used as a measure of need in these programs, gained wide acceptance partly because equal shares per person, suggest what is commonly referred to as 'political fair share,' and partly because population data are readily available and easily obtainable at regular intervals." *Id.* at 1.

trated. However, as this Court pointed out in *Mathews* v. *Diaz*, 426 U.S. 67, 80 (1976):

> [T]he fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits for *all aliens*. Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and *some* of its guests.

Thus, illegal aliens have no Constitutional basis for a share in these benefits and no program specifies their eligibility on statutory grounds. Nevertheless, as a result of the 1980 census, these assistance funds will, according to the numbers of illegal aliens, be allocated to those jurisdictions in which they are concentrated. Accordingly, the undifferentiated inclusion of illegal aliens in every 1980 census data base raises a substantial question concerning the discriminatory administration of programs, channelling to local jurisdictions $50 billion annually over the next decade, in a manner denying equal protection to those, like the various Appellants, who *do* have a claim to an equitable share in these benefits but who live in localities with small illegal alien populations.

The lower court dismissed this equal protection challenge on the ground that what it saw as a "blunderbuss attack" did not present "a case in a proper posture for consideration by a court" of whether the potentially skewed allocations under these programs had a "rational basis." App. B at 12a, n.9. FAIR, however, demonstrated the impact these programs will have over the next decade on the quality of life throughout this country, implicating, in the context of several specific programs, interests this Court has seen as so fundamental as to require compelling justification for any governmental action impinging upon their exercise.[24] Further, FAIR made particular reference to those programs, and state laws governing local distribution of these funds, that specify the ineligibility of illegal aliens for any such benefits.[25] FAIR then demonstrated the irrationality of allocating funds according to the presence of those precluded from receiving them, thereby conferring a windfall on the lawful residents of localities with large illegal alien populations, again at the expense of those, like the various Appellants, who lawfully reside in areas with small numbers of illegal aliens.

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[24] Interstate travel is clearly affected by the size of census-based awards of federal highway funds. *See* Federal Aid Highway Act of 1956, as amended, 23 U.S.C. § 104. However, more than interstate highway construction is here implicated. To paraphrase *Shapiro* v. *Thompson*, 394 U.S. 618, 629 (1969), one "who desires to migrate, resettle, find a new job, and start a new life will doubtless hesitate if he knows that he must risk making the move" to a jurisdiction where the fabric of community life may over the next decade be frayed by the misallocation of $50 billion annually in federal assistance funds.

[25] *See, e.g.*, the Comprehensive Employment and Training Act, Pub. L. No. 93-201, 87 Stat. 838, as amended, a major census-based program expressly limiting participation "to citizens and nationals of the United States, lawfully admitted permanent resident aliens, and lawfully admitted refugees and parolees." 29 U.S.C. § 834(e). California precludes all non-citizens from any public assistance benefits absent a certification (cross-checked with the Immigration and Naturalization Service) that an alien-applicant is lawfully resident in that state. Cal. Welf. & Inst. Code § 11104 (West). Similarly, New York also precludes illegal aliens from receipt of any social assistance, likewise enforced by verification of an applicant's status with the INS. *See generally* N.Y. Soc. Serv. Law § 131-k (McKinney 1979-80 Supp.).

The lower court thus left unanswered questions that are substantial not only in terms of the equal protection claims prompted by the 1980 census but also the potential for a wide-scale misallocation of perhaps a half trillion dollars over the next decade of funds that have a pervasive impact upon the quality of life in this country. Further, much like its analysis of standing with respect to legislative malapportionment, the lower court's approach invites relitigation of this same issue in the context of individual allocations subsequently made under each of these 100 programs, rather than in the most efficient framework of a challenge to the one act which will give rise to that multiplicity of lawsuits. For these reasons, FAIR's claims concerning the discriminatory administration of the census-based assistance programs warrant plenary consideration by this Court.

APPELLANTS WILL PRESENT OTHER SUBSTANTIAL QUESTIONS ON THE MERITS

In the proceeding below, FAIR also presented claims based on section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706, bearing on the Census Bureau's arbitrary and capricious decision to promote the inclusion of illegal aliens in the census enumeration without any means to identify the number of such persons otherwise to be included in all the apportionment and allocation bases derived from the census. FAIR further showed that the Census Bureau failed to consider the "relevant factors" in deciding to afford illegal aliens a status equal to lawful residents in every legislative and fiscal apportionment base to prevail for the next decade, thereby undoubtedly compounding the already severe economic and social consequences of

the growing phenomenon of illegal immigration, and in deciding to forego an invaluable opportunity to obtain a more precise data profile on the illegal alien population. The lower court was thus incorrect in finding that FAIR had failed to explain this aspect of its complaint [App. B at 11a, n.8], and, since the various Appellants' interests in this respect are well within the zone of those protected by the Constitution, the Census Act and the immigration laws, they have standing to assert these matters. Therefore, FAIR will on appeal present a substantial case on the merits of these remaining claims.

THE LOWER COURT ABUSED ITS DISCRETION IN DENYING INTERLOCUTORY RELIEF

Two factors were relied upon by the lower court in its ruling that "the plaintiffs have failed to establish their entitlement to equitable relief at this time." App. B at 24a. The first was what the court saw as the Census Bureau's "convincing showing that forcing it to attempt a separate head count of illegal aliens would be extremely expensive, delay the census by as much as a year, and likely be ineffective in any case." *Id.* Wholly apart from the sufficiency of the Census Bureau's showing in this respect, the lower court failed to consider the fact that relief could be effected not only by "a separate head count of illegal aliens" but by a variety of alternative measures FAIR advanced during the proceeding to achieve the ultimate result of excluding illegal aliens from the apportionment population. Thus, whatever obstacles may exist to conducting a "separate census" for illegal aliens, the lower court abused its discretion by limiting its equitable consideration simply to that one avenue of relief.

Incongruously, upon finding a separate enumeration of illegal aliens unfeasible, the court secondly found that injunctive relief was unnecessary since the Census Bureau could later construct such an enumeration. Quoting from an affidavit by one of FAIR's witnesses refuting the Census Bureau's claim that relief would require a complete revision of the already-prepared census format, the court concluded: "It thus appears the plaintiffs would be satisfied with *no change at all* in the proposed census, so long as an estimate of the number of illegal aliens in each census tract is prepared and subtracted from the population base before the apportionment of congressional seats." *Id.* at 25a. As far as it goes, the court's analysis of FAIR's position on the method suggested by its witnesses is correct. But the lower court overlooked a vital consideration.

The testimony quoted by the court concerned a means by which data drawn from the "citizenship" questions already appearing on the long form census questionnaire [26] could be used as a base to determine the aggregate number of non-citizens enumerated. The Census Bureau, however, had advised the lower court that, apart from any relief the court might order, it had no intention of revising its current priorities to tabulate

[26] The Census Bureau is conducting the 1980 census by mailing questionnaires to each of the 86 million identifiable housing units in the U.S. Eighty percent of those households will receive "short form" questionnaires, the balance will receive considerably more detailed "long forms." The 17 million long forms contain the questions identifying household members as native-born or naturalized citizens or aliens "resident" in the U.S. by the Census Bureau's criteria.

the data from those particular questions earlier than the anticipated schedule some time in the latter part of 1981 or in 1982, well after the reapportionment process is completed at the national level and underway within the states.

This assessment of the equities was therefore an abuse of the lower court's discretion by its failure to look beyond but one means to effect relief, compounded by the failure to consider the interlocutory steps necessary to insure the prompt implementation of that measure.

CONCLUSION

The lower court's ruling on the novel statutory and Constitutional questions here raised will, if permitted to stand, force the relitigation of those questions, state-by-state or election district-by-election district, throughout the federal court system until this Court resolves the issues. Those issues are squarely presented in this appeal and raise substantial and fundamental questions concerning the nature of representative government in this country, the allocation annually of billions in vital assistance funds and the efficacy of our immigration laws.

Most fundamentally in question is the credibility of the decennial census and reapportionment process that must serve as the impartial guarantor of the very premise for the representative form of government designed by the Framers. The issues are thus decade-long and nationwide in their impact. Accordingly, this

case warrants plenary consideration by this Court, and for these reasons, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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PROOF OF SERVICE

I, George J. Weiner, a member of the bar of the Supreme Court, do hereby certify that, pursuant to Rules 33(1) and (2)(a) of the Rules of the Supreme Court, three copies of Appellants' foregoing Jurisdictional Statement were served this 10th day of April, 1980, upon counsel of record for all parties in this proceeding, as follows:

1. Upon Wade H. McCree, Solicitor General of the United States and counsel of record for Appellees Klutznick, *et al.*, by hand delivery of said copies addressed to him at the Office of the Solicitor General of the United States, U.S. Department of Justice, Room 5143, 10th & Constitution Avenue, N.W., Washington, D.C. 20530;

2. Upon Daniel K. Mayers and John Payton, counsel of record for Intervenor-Appellees the State of New York, *et al.*, by hand delivery of said copies addressed to them at the offices of Wilmer & Pickering, 1666 K Street, N.W., Washington, D.C. 20006;

3. Upon Paul S. Ryerson and Mark L. Perlis, counsel of record for Amicus Curiae, the Mexican-American Legal Defense and Educational Fund, in the proceeding below, by hand delivery of said copies addressed to them at the offices of Arnold & Porter, 1229 - 19th Street, N.W., Washington, D.C. 20036; and

4. Upon Benson Scotch, Assistant Attorney General, State of Vermont, counsel of record for applicant Amicus Curiae, the State of Vermont, in the proceeding below, by mailing said copies, air mail postage prepaid, to him at the Office of the Attorney General,

State of Vermont, Pavilion Building, Second Floor, Montpelier, Vermont 05602.

I further certify that all parties required to be served have been served.

GEORGE J. WEINER
Counsel for Appellants

Appendix

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-3269

FEDERATION FOR AMERICAN IMMIGRATION REFORM (FAIR) ET AL.,

Plaintiffs,

v.

PHILIP M. KLUTZNICK, SECRETARY OF COMMERCE, ET AL.,

Defendants.

ORDER

Filed February 26, 1980

Upon consideration of the motions before the Court, the memoranda submitted in support thereof and in opposition thereto, the argument of counsel in open Court, and the entire record herein, and for the reasons set forth in the accompanying Opinion of this same date, it is by the Court this 26th day of February, 1980,

ORDERED that plaintiffs' motion for preliminary injunction be, and hereby is, denied; and it is further

ORDERED that plaintiffs' motion for summary judgment be, and hereby is, denied, and it is further

ORDERED that plaintiffs' motion for joinder of parties and for leave to file amendments to their complaint be, and hereby is, granted; and it is further

ORDERED that Representatives William S. Clinger, Jr., William F. Goodling, Joseph M. McDade, Don Bailey, Raymond F. Lederer, Charles F. Dougherty, Gus Yatron, Joseph M. Gaydos, Eugene V. Atkinson, Michael Myers, Robert S. Walker, John P. Murtha, Austin Murphy, Marc Lincoln Marks, R. Lawrence Coughlin, Don Ritter, Bud

Shuster, Richard T. Schultze, Doug Walgren, and James M. Jeffords, Senator John Heinz, and the Committee for Representative Government be, and hereby are, joined as plaintiffs in this action; and it is further

ORDERED that the Clerk of the Court be, and hereby is, directed to file plaintiffs' amended complaint, the attachment to plaintiffs' motion for joinder of parties and leave to file amendments to complaint that is entitled "Amended Complaint for Injunctive and Declaratory Relief"; and it is further

ORDERED that defendants' motion to dismiss or, in the alternative, for summary judgment be, and hereby is, granted; and it is further

ORDERED that the motion of the State, City, and Mayor of New York to intervene as defendants be, and hereby is, granted; and it is further

ORDERED that summary judgment be, and hereby is, entered for defendants and intervenor-defendants; and it is further

ORDERED that the action be, and hereby is, dismissed; and it is further

ORDERED that the three-judge court convened pursuant to 28 U.S.C. § 2284 (1976) be, and hereby is, dissolved.

/s/ PATRICIA M. WALD
Patricia M. Wald
United States Circuit Judge

/s/ OLIVER GASCH
Oliver Gasch
United States District Judge

/s/ BARRINGTON D. PARKER
Barrington D. Parker
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-3269

FEDERATION FOR AMERICAN IMMIGRATION REFORM (FAIR) ET AL.,
Plaintiffs,

v.

PHILIP M. KLUTZNICK, SECRETARY OF COMMERCE, ET AL.,
Defendants.

OPINION

Filed February 26, 1980

This court is convened as a three-judge court to consider the constitutionality of the 1980 census, due to be conducted within a few weeks, insofar as it will fail to establish the number of illegal aliens in the country, or the states and districts within which they live. The failure to undertake this effort, plaintiffs [1] allege, will result in the inclusion of a large but presently unascertainable number of illegal aliens in the population figures which form the basis for the apportionment of United States Representatives among the states, the apportionment by many states of their congressional and state officials among districts, and the distribution of federal funds for a variety of programs. The exclusion of illegal aliens from the apportionment population base is mandated, they contend, by the

[1] The plaintiffs joined in the Amended Complaint include the Federation for American Immigration Reform [FAIR] and the Committee for Representative Government on their own behalf and as representatives of their members, Representatives from Kentucky, California, Illinois, Vermont and Pennsylvania and a Pennsylvania Senator.

Constitution, which assertedly contemplates that only lawful residents should be included in the population figures from which apportionment is made. Since current estimates indicate that the bulk of illegal aliens live in a relatively few states, and further within a relatively few cities within those states, undifferentiated inclusion of illegal aliens in the general population figures will result in disproportionate allocations to those states and regions of both congressional Representatives and federal funds distributed on the basis of population. Thus, the plaintiffs allege, the votes of persons in some states or regions will be diluted in comparison to those in the states and regions with a large illegal alien population, and those same persons may, as residents of the disadvantaged states or regions, also receive a lesser share of federal monies.

We conclude that we lack jurisdiction to decide the merits of the case because the plaintiffs lack standing to raise the issue, and we therefore grant summary judgment to the defendants.[2]

I. The Census and the Constitution: The Positions of the Parties

The 1980 decennial census, scheduled to commence April 1, 1980, will be the twentieth effort to enumerate the population of the United States, pursuant to constitutional and statutory command, for the principal purpose of determining the number of Representatives which each state is entitled to send to the United States House of Representatives. Article I, section 2, clause 3, of the Constitution provides:

> Representatives . . . shall be apportioned among the several States which may be included within this

[2] The defendants are the Secretary of Commerce, the Director of the Bureau of the Census, the President of the United States, and the Clerk of the House of Representatives.

> Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.

With the abolition of slavery, the formula for apportionment was revised. The fourteenth amendment modified the first sentence of article I, section 2, clause 3, to provide:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.

The most recent Census Act, 13 U.S.C. §§ 1, *et seq.*, adopted in 1976, charges the Secretary of Commerce with the responsibility of conducting the census, calculating the number of Representatives to which each state is entitled, and transmitting those figures to the President, who then, pursuant to the mandate of 2 U.S.C. § 2(a), delivers them to the Clerk of the House of Representatives, who officially notifies each state of the size of its delegation. The allocation of Representatives is accomplished pursuant to a formula known as the "method of equal proportions," which, it has been determined by Congress, results in an allocation of Representatives most nearly proportional to the actual population figures of the several states. *Id.*

The census figures are also used for a variety of other purposes. Most relevant to this lawsuit is the fact that many states use the figures as the basis for their own internal apportionment of state and local governmental bodies, and Congress requires the use of the figures as a

basis for distribution of federal funds under a number of financial assistance statutes.[3]

The population base used for apportionment purposes consists of a straightforward head count, as accurate as is reasonably possible, of all persons residing within a state on April 1.[4] This has been the practice since the first census in 1790; everyone is counted except foreign diplomatic personnel living on embassy grounds (which is considered "foreign soil," and thus not within any state) and foreign tourists, who do not "reside" here. The Census Bureau intends to make no effort to count separately the number of illegal aliens currently resident in the country, though it has undertaken a substantial effort to minimize undercounting of the minority groups which are likely to include illegal aliens.[5]

[3] According to a 1978 report, some 107 federal programs use census data or population figures developed from census data as a factor in allocating federal funds. B. Maffei, Staff of House Subcommittee on Census and Population of the Committee on Post Office and Civil Service, 95th Cong., 2d Sess., *Report on the Use of Population Data in Federal Assistance Programs* 11 (Comm. Print 1978). *See, e.g.*, State and Local Fiscal Assistance Act, 31 U.S.C. § 1221, *et seq.*; Comprehensive Employment and Training Act, 29 U.S.C. § 801, *et seq.*; Social Security Act, 42 U.S.C. § 301, *et seq.*; Community Development Act of 1974, 42 U.S.C. § 5301.

[4] The Census is conducted largely by mail, using two questionnaires. The "short form" asks seven questions about each person living in a particular residence; name, sex, birth date, marital status, relation to the person in whose name the dwelling is owned or rented, race, and whether the person is Hispanic. There are also a number of questions about the dwelling itself. There are *no* questions concerning citizenship. This form is sent to 80 percent of American households.

The remaining 20 percent will receive "long-form" questionnaires, containing dozens of additional questions. The long form does ask the country of birth and whether any household members born outside the United States are citizens. No questions are on either form from which an alien's legal status could be directly determined.

If a census form is not returned by mail, a census taker will personally contact the household. There will also be a "Mission Night" and a three-week "casual count," during which census personnel will attempt to gather data on individuals with no regular home. See, for further explanations of how the census is conducted, Hacker, *The No-Account Census*, Harper's March, 1980, at 28; Affidavit of V. Lance Tarrance, ¶¶ 5-9; Affidavit of Daniel B. Levine, ¶¶ 6-7.

According to the plaintiffs, the number of illegal aliens within our boundaries has skyrocketed in the last decade. While no accurate data is available, most present estimates of their numbers range between three and eight million.[6] This is a large enough population that, plaintiffs allege,

[5] The Bureau has devoted a great deal of time and effort to developing means to more accurately count the "hidden" population which has been missed in prior censuses. It has developed a bilingual questionnaire and undertaken a substantial public relations campaign designed to encourage response to the questionnaire and assure the population of the confidentiality of all answers. Special efforts have been made to hire censustakers familiar with ethnic neighborhoods and able to speak the language of the people they will be contacting. It remains to be seen, of course, whether any or all of these efforts will bear fruit. For an analysis of the Census Bureau of the extent of the undercount problem, see "Estimates of Coverage of Population by Sex, Race and Age: Demographic Analysis," 1970 Census Evaluation and Research Program, Publication No PHC(E)-4 (1974). See also U.S. Comm. on Civil Rights, *Counting The Forgotten* (1974).

[6] No estimate of the size of the illegal alien population exists which is accepted as accurate or based on hard data. In a recent report, the Census Bureau reviewed the results of a number of different studies, identified the statistical shortcomings of each, and offered its own opinion that the illegal alien population is "almost certainly below 6.0 million, and may be substantially less, possibly only 3.5 to 5.0 million." *Preliminary Review of Existing Studies of The Number of Illegal Residents in the United States* 19 (1980). FAIR's Executive Director described these low estimates as "practically snatched out of the air," Washington Post, Jan. 31, 1980, at p. A15, and the plaintiffs contend here that the minimum possible illegal alien population is 5 million.

including illegal aliens in the apportionment base could cause a shift between states of between one and sixteen congressional seats, depending on concentrations in particular states and cities.

The constitutional core of plaintiffs' argument is that the phrase, "the whole number of persons," does not, in historical context, include illegal aliens, though they agree that the concept includes all *lawful* residents, citizen and alien alike. Their argument proceeds along the following lines. The concept of illegal aliens was unkown to the Framers; there *were* no illegal aliens for nearly a century thereafter when the first act excluding certain aliens (prostitutes and convicts) was passed. Act of March 3, 1875, 18 Stat. 477. Arguing that an intent to grant representation to persons unlawfully within the country therefore cannot logically be attributed to the Framers, the plaintiffs contend that inclusion of illegal aliens in fact defeats the purpose of apportionment; equal representation for equal numbers of "people of the United States." They request declaratory and injunctive relief, requiring the Census Bureau to use its "best efforts" to count illegal aliens separately and exclude them from the apportionment base.

The Bureau responds that it is constitutionally *required* to include *all* persons, including illegal aliens, in the apportionment base, insofar as an accurate count is reasonably possible. Furthermore, as a practical matter, it contends accurate methods to count illegal aliens do not presently exist, and would take months to develop, if it could be done at all. Intervenor New York State and amicus Mexican-American Legal Defense and Educational Fund argue that obtaining even a reasonably accurate count of the total population would be impossible if a simultaneous effort were made to count illegal aliens separately. The two goals are incompatible, according to the Bureau; any effort to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count. Obtaining the

cooperation of a suspicious and fearful population would be impossible if the group being counted perceived any possibility of the information being used against them. Questions as to citizenship are particularly sensitive in minority communities and would inevitably trigger hostility, resentment and refusal to cooperate. The Census Bureau's representations in this regard are supported by the amicus brief of the Mexican-American Fund, which has described for us the fears of persecution, particularly in Hispanic communities which it says would be exacerbated by the relief sought by the plaintiffs.

II. Standing as a Jurisdictional Principle

As a court of limited jurisdiction, our threshold inquiry must be to ensure that we are presented with a justiciable case, a "case or controversy" within the meaning of Article III. Part of the inquiry into whether a "case or controversy" exists must focus on whether any of the plaintiffs here have standing to present the issue discussed above. Standing is a complex issue, embodying both constitutional and prudential limitations on the exercise of the power of a federal court, but the initial question is whether the plaintiffs have established the indispensable constitutional minimum which must be present in every case, a concrete injury suffered personally by the party seeking relief. While the plaintiff need only allege "an identifiable trifle" of injury to overcome the constitutional barrier to invocation of the power of the courts, *United States* v. *SCRAP*, 412 U.S. 669 (1973), the Supreme Court has emphatically held that there is no such thing as "citizen standing" or "issue standing." *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208 (1974). Concern with or interest in an issue is simply not enough to entitle a litigant to demand resolution of a legal issue.

On the other hand, the mere fact that the injury is a small one, suffered generally by a large number of people,

poses no absolute *constitutional*[7] barrier to standing, so long as the plaintiff is able to establish that he or she personally has suffered the claimed injury. There is no doubt that individuals claiming that their votes are diluted because their Representative represents a greater number of constituents than do other Representatives in the same assembly have standing to challenge the apportionment scheme. *Baker* v. *Carr*, 369 U.S. 186 (1962). In such a case, the question is "whether the claims of malapportionment . . . are in fact made by plaintiffs whose representation would be improved if those claims were to prevail." *Ripon Society* v. *Nat'l Rep. Party*, 525 F.2d 567, 572 (D.C. Cir. 1975) (en banc), *cert. denied*, 424 U.S. 933 (1976). As expressed by the court in *Baker* v. *Carr*, assuming that the plaintiffs' allegations assert a legally cognizable injury, it is enough for standing purposes that the plaintiffs "are among those who have sustained it." 369 U.S. at 208.

In numerous cases in the Supreme Court deciding issues of standing, the same fundamental proposition is emphasized. A party who is unable to demonstrate that an interest of his or her own is at stake always lacks standing. We find that principle dispositive of this case, as shown in the following discussion.

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[7] The prudential limitations on standing may bar the hearing of such cases, but we need not consider them here. The constitutional requirement of injury in fact, suffered by the plaintiff, is dispositive.

The failure of a plaintiff to establish injury in fact can arise in a number of different contexts. For example, the plaintiff may have failed to show that the action under attack has caused or will cause any actual harm at all, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (challenge to members of Congress holding Armed Forces Reserves' commissions during their term of office); or, assuming that a substantial, cognizable injury has been shown, the plaintiff may have failed to show that he or she is among those who have sustained it. Warth v. Seldin, 422 U.S. 490 (1975). Our discussion will focus primarily on the latter.

III. The Standing of These Plaintiffs

In this case, the plaintiffs are the Federation for American Immigration Reform, the Committee for Representative Government (groups concerned with the alleged problems posed by our illegal alien population) and a group of legislators, some representing states with allegedly small illegal alien populations and others representing states with large illegal alien populations but areas thereof with small populations of unlawful residents. The allegations of injury are based on the plaintiffs' status as voters and lawful residents; no separate injury is alleged to be a result of some plaintiffs' status as Members of Congress. Furthermore, while the organizational plaintiffs allege standing "on their own behalf," no particular injury to them as organizations is alleged, and it is clear that they in fact appear solely as representatives of their members.[8] The plaintiffs' allegations as to standing are essentially that some one or more of them will likely suffer the loss of at least one national or state representative, and receive proportionately fewer federal benefits if the census proceeds as planned than if illegal aliens were counted and then eliminated from the apportionment base.

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[8] The plaintiffs do assert that somehow counting illegal aliens in the census figures will "intensify and augment the movement to and residence in the United States of such persons," harming the plaintiffs' interest in the "just and full enforcement of [immigration] laws and in efforts to conform laws and policies governing immigration to modern-day demographic, economic and resource realities." Assuming that this would occur (and the plaintiffs offer us no explanation of the causal relationship involved) it is an example of the sort of "abstract interest" in a problem which the Supreme Court has made clear is insufficient to form a basis for standing. Sierra Club v. Morton, 405 U.S. 727 (1972). We assume, however, for purposes of this opinion, that if some of FAIR's members had standing, FAIR itself would be able to sue on their behalf as an organizational representative. *But cf.* Ripon Society v. Nat'l Rep. Party, 525 F.2d 567, 573-74 (D.C. Cir. 1975) (en banc).

For purposes of our standing analysis, we must assume, as plaintiffs allege, that the census method and resulting apportionment is indeed unconstitutional in that illegal aliens should be separately counted and excluded from the apportionment base. We also must accept as true the plaintiffs' estimate that the contemplated method will result in the misallocation of from one to sixteen seats in Congress. Furthermore, it is undisputed that many states will use those same figures for their own internal apportionment, and that Congress will distribute some federal monies according to the total population as counted by the Census Bureau.[9]

Given all these assumptions, the plaintiffs' showing as to standing is inadequate on a number of fronts. They have failed to demonstrate concrete harm which will occur and be suffered by any one of them, and they have also failed to demonstrate that the relief they request will benefit

[9] We will discuss this final issue only briefly. While Congress may well be distributing federal monies on the basis of undifferentiated population figures, that is its choice. The plaintiffs' allegation that it is irrational to distribute funds to states and localities on the basis of total population including illegal aliens and that they are being unlawfully discriminated against as a result of that choice lacks merit. Congress may choose any method of allocation it prefers, subject only to the constraints of the "rational relationship" test. Ohio Bd. of Empl. Services v. Hodory, 431 U.S. 471 (1977). The plaintiffs' argument seems ultimately to be that if Congress knew how many illegal aliens there were, it might choose to do things differently. That is up to Congress, not us; the means for requesting a calculation of the number of illegal aliens or excluding them from the basis for allocation of funds in specific statutory contexts are at its disposal, while we may order such a count only if it is statutorily or constitutionally required. In any case, we will not consider such a blunderbuss attack on the method Congress has chosen to distribute federal funds. Each statute serves different purposes, and if a plaintiff able to establish standing alleges in the context of a particular statute and its purposes that the choice made is irrational, we might have a case in a proper posture for consideration by a court. This is certainly not that case.

them personally. Indeed, it is impossible for them to do so, because of the way our method of apportionment operates. While the plaintiffs estimate that between one and sixteen congressional seats will be affected depending on the inclusion of illegal aliens, they can do no more than speculate as to which states might gain and which might lose representation. It may be Ohio which will gain; but on the other hand, it may be Alabama. Depending on how many illegal aliens there are, where they live, how accurate the census count is, and the interplay of all the other population factors which affect apportionment,[10] any of a number of states might benefit by the relief requested by the plaintiffs; the only effect which seems inevitable is that California would lose seats, though again, how many is a matter of speculation. Therefore, ***none*** of the plaintiffs are able to allege that the weight of his or her vote in the next decade ***will be affected*** by the expected method of taking the census and apportioning congressional seats. Indeed the plaintiffs expressly concedes this point; they point out for us that "prior to the conduct of the 1980

[10] As we have pointed out, *supra* note 5, undercounting is a serious problem for the Census Bureau, while at the same time, small shifts in population can make a significant difference in apportionment, especially at the state level. For instance, though each Representative in Congress represents roughly half a million people, because of the use of the "method of equal proportions," by the time the last few congressional seats are allocated very small differences in population become decisive. The present 435th seat in Congress was awarded to Oklahoma rather than Oregon. If Oregon had had 250 more persons in its apportionment population, it would have been the other way around. Tarrance Aff., ¶ 20. Thus, very small movements of persons from one place to another can be important, utlimately as important as large settlements of aliens in New York City or Los Angeles. The effects which counting illegal aliens may have on apportionment are therefore not straightforward and numerical, but are diffused and may be negated entirely by other population movements, such as the settlement of retirees in Florida, or of young professionals in Atlanta and Phoenix.

census and any intrastate reapportionment taken on the basis of tabulations, it is, of course, not possible to define precisely the parameters of the variances to result." Plaintiffs' Points & Authorities in Support of Preliminary Inj., at 22.[11]

The points is that plaintiffs' allegations are far too speculative to permit us to conclude that any *particular* plaintiff has an interest at stake in this proceeding and would benefit from the relief requested. It is not sufficient to allege that a plaintiff is one of a group, some of whom are likely to be injured. The fact that these plaintiffs share characteristics common to persons likely to be harmed is an insufficient basis for a conclusion that plaintiffs *themselves* will be harmed or their rights violated. They "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they

[11] With regard to the alleged harm suffered as a result of local use of the census data for internal apportionment of state and local representatives, the case for finding standing in any one of the plaintiffs is not much stronger. However, in spite of the inadequate data, it seems likely that, for instance, Springfield, Illinois will be at a disadvantage in comparison to Chicago if Illinois uses census data for apportionment purposes. This issue need not detain us, however. So long as they meet the demands of the fourteenth amendment, the individual states have considerable flexibility in deciding how to set up their internal government, including reapportioning electoral districts. Burns v. Richardson, 384 U.S. 73 (1966). While many of them use census data to do so, all of them need not and do not. For example, Hawaii's use of registered voters as an apportionment base was upheld in *Burns*. Moreover, the defendants have no constitutional duty to supply the states information in any particular form and these defendants certainly do not have the power or authority to dictate to the states how they should apportion themselves. To the extent that use of census data for intrastate districting violates the law of any particular state as it has been alleged it does in California, or offends the dictates of the fourteenth amendment, the remedy is clearly not in this court against these federal defendants.

purport to represent." *Warth* v. *Seldin*, 422 U.S. 490, 502 (1975).

Despite diligent search, we have been unable to find a single case in which standing was granted to a plaintiff because *some* harm was likely to occur and it *might* affect the litigant personally, and we have been referred to no such case. Indeed, in similar cases, the very problem with which we are faced here has been consistently identified as fatal to federal jurisdiction.

In *Warth* v. *Seldin*, for instance, one group of plaintiffs were low-income persons who sought to challenge the alleged exclusionary zoning practiced by Penfield, New York. Even assuming that the plaintiffs had alleged a constitutional violation by the defendants and that if the Court granted relief more housing would be available to low-income persons, the Court nevertheless concluded that the plaintiffs could not rest a claim to standing simply on the fact that they were members of that group:

> But the fact that these petitioners share attributes common to persons who may have been excluded from residence in the town is an insufficient predicate for the conclusion that petitioners themselves have been excluded, or that the respondents' assertedly illegal actions have violated their rights. Petitioners must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent. Unless these petitioners can thus demonstrate the requisite case or controversy between themselves personally and respondents, "none may seek relief on behalf of himself or any other member of the class."

422 U.S. at 502.

Similarly, in *O'Shea* v. *Littleton*, 414 U.S. 488 (1974), a group of black plaintiffs brought suit against certain pub-

lic officials in Cairo, Illinois, alleging a pattern and practice of discriminatory conduct in the administration of the criminal justice system. The Supreme Court concluded that none of the plaintiffs had standing, though they were members of a group, some of which were likely to suffer from the alleged conduct in the future. The Court pointed out that granting standing to any particular plaintiff would rest the requirement of a personal, concrete injury on the possibility that that plaintiff in the future violate the criminal law and be tried for his or her offense, in which event the plaintiff may appear before the defendants, and the defendants may then continue their discriminatory conduct to the plaintiff's detriment. Granting standing in such a case would, for all practical purposes, eliminate the requirement of injury in fact.

We conclude that granting standing in this case would involve resting the requirement of injury in fact on speculation and conjecture. For instance, most of the individual named plaintiffs are residents of Pennsylvania. In order to conclude that they have been standing, we would have to assume that the Census Bureau will in fact be fairly successful in its efforts to include aliens in the census count, that the mathematical application of the method of equal proportions to the population figures will be affected by the inclusion of these figures, and that Pennsylvania will be among those states which will benefit. Interestingly enough, the plaintiffs have submitted charts showing their estimation of the effects on congressional apportionment given a variety of different possible assumptions about the illegal alien population. Among the charts which assume that the present census figures *include* illegal aliens, Pennsylvania is only affected if there are in fact *eight million* illegal aliens in the country, a figure at the upper limits of available estimates. Furthermore, according to the plaintiffs' own calculations, the interests of the Representative from Vermont are not affected at all, no matter what the various assumptions about the size and the distribution of

the illegal alien population. This demonstration could be repeated for each of the named plaintiffs and each of FAIR's members; while we may assume, and indeed be convinced that there will be *some* effect on apportionment by the inclusion of illegal aliens in the population base, the plaintiffs have failed to demonstrate with requisite specificity where that effect will fall, so that we would be able to find a "concrete injury" to some particular resident of some particular state.

We are further bolstered in our conclusion by other cases dealing specifically with the census, in which standing was also denied. For example, in a case much like this one, the Second Circuit concluded that the plaintiff lacked standing. *Sharrow* v. *Brown*, 447 F.2d 94 (2d Cir. 1971), *cert. denied*, 405 U.S. 968 (1972). Sharrow, a New York resident, sought to enjoin the failure of the Census Bureau to count and deduct the number of disenfranchised voters from the apportionment base, an explicit command of the fourteenth amendment. According to the plaintiff, the provision was adopted to deter the practice of some states of effectively eliminating the right of black citizens to vote through the use of various tests and taxes. By deducting all such disenfranchised citizens from the population figures, offending states would suffer the loss of congressional seats. However, apparently no effort has ever been made to actually conduct the census and apportionment in conformity with the fourteenth amendment.

The plaintiff alleged that as a resident of a state which did not attempt to limit the franchise, he would likely benefit from the relief sought because New York might receive one of the seats lost by the offending states. While the court agreed that if the plaintiff had established that this would in fact occur, he would have standing, it concluded that the plaintiff had failed to make an adequate showing that New York's delegation would be affected. The court

acknowledged that standing would be virtually impossible to establish in a challenge to nationwide apportionment:

> For instance, to establish standing in the present case, Sharrow would have to show, at least approximately, the apportionment his interpretation of [section 2 of the fourteenth amendment] would yield, not only for New York but for every other State as well. This would necessitate a state-by-state study of the disenfranchisement of adult males, a task of great porportions. And even after approximate nation-wide reapportionment figures were derived, it might well be that, because of population shifts, or because New York itself disenfranchised a portion of its adult males, New York's representation would not be increased as Sharrow claims.
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> . . . .
>
> [The plaintiff's] sincere effort, an effort which we respect, to rectify what he considers a grave constitutional mistake is not enough. He must establish that the failure to enforce [section 2 of the fourteenth amendment] has resulted in a detriment to his rights of representation in Congress and this he has failed to do.

Id. at 97. *Accord, Lampkin* v. *Connor,* 239 F. Supp. 757 (D.D.C. 1965), *aff'd on other grounds,* 360 F.2d 505 (D.C. Cir. 1966). Similarly, in *Daughtrey* v. *Carter,* 584 F.2d 1050 (D.C. Cir. 1978), the plaintiffs sought review of the presidential pardon of those who had left the country to avoid the draft. They alleged that the unlawful restoration of these persons' citizenship rights, and their ensuing votes, would dilute the weight of the plaintiffs' lawfully-cast ballots. The court of appeals affirmed the dismissal of the complaint because the plaintiffs had not alleged a personal injury:

> They do not contend that their votes are diluted in any particular election or in any particular geographical area, nor do they contend that they are an identifiable group of voters whose votes are disfavored *vis-a-vis* those of some other group. At best the complaint alleges that as qualified voters of political subdivisions anywhere in the United States, appellants' votes in elections for any office, whether national, State, or local, are being diluted as a result of the reentry into the United States of an admittedly unknown, relatively small number of persons who allegedly should be excluded, and who therefore should not be entitled to vote.

Id. at 1056 (footnotes omitted).

Such cases are a far cry from the case relied on most heavily by the plaintiffs to support their claim for standing, *Baker* v. *Carr,* 369 U.S. 186 (1962). *Baker* was a challenge to the internal apportionment of Tennessee, the plaintiffs alleging that the drawing of district lines was so little tied to population that "a single vote in Moore County, Tennessee, [was] worth 19 votes in Hamilton County, [and] that one vote in Stuart or in Chester County [was] worth nearly eight times a single vote in Shelby or Knox County." 369 U.S. at 245 (Douglas, J., concurring). The plaintiffs, as residents and voters in these more heavily populated and thus disadvantaged counties, sought relief "to protect or vindicate an interest of their own," and were "voters who allege facts showing disadvantage to themselves as individuals," a showing which was sufficient for the purposes of standing. While that case clearly established that even a very small "concrete injury," amounting to a slight dilution of the weight of a single vote, is sufficient to support standing, the case equally clearly required that the plaintiffs show that they will be among those who have sustained the injury. In fact, the decision reemphasized the established rule that a plaintiff must be able to allege a personal stake in the outcome of the case. This the plaintiffs in this case have failed to do.

Another elementary component to standing is lacking here. The plaintiffs have failed to demonstrate that the relief they seek will redress the injury they assert. There must be "a substantial likelihood that the exercise of the court's remedial powers would redress the claimed injuries." *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74 (1978); *Greater Tampa Chamber of Commerce* v. *Goldschmidt*, No. 79-1123 (D.C. Cir. Feb. 8, 1980). Plaintiffs seek an order requiring identification of the illegal aliens in residence and exclusion of them from the apportionment population, alleging that only in this way will an unconstitutional dilution of their right to vote be avoided. While they would leave the actual method of counting illegal aliens up to the Bureau's expertise, one way they have proposed to do so is to estimate the total number of aliens, based on a citizenship question in the census questionnaire, and then calculate the number of illegal aliens by comparison of that total with data from the Immigration and Naturalization Service of the number of aliens lawfully present in the country.

The problem is that the defendants have made a convincing showing that neither Census Bureau nor INS figures are accurate enough to permit such a calculation with any reasonable degree of accuracy. The Census Bureau has conceded that it has had a serious problem in obtaining accurate counts of minority populations. Indeed, use of plaintiffs' proposed method of calculation based on data from the 1970 Census results in a total illegal alien count of *minus* 623,000.[12] While the Bureau has devoted large

[12] By focusing on this single problem, we do not intend to downplay or ignore the other problems the defendants have raised with ordering the relief sought by the plaintiffs. For example, the very concept of "illegal alien" amounts only to a vague notion of a person who might be deported if his or her presence were known to the authorities. But the determination of that legal fact can be a complicated process, as our numerous cases involving attempts by the INS to deport residents of this country demonstrate. The Immigration and Nationality Act is long and complex, full of provisos and exceptions. It would be absurd to expect the Census Bureau to develop figures, accurate enough to be used for the constitutional purpose of apportionment, of the number of deportable aliens present in this country, and even more absurd to ask for those figures on a block-by-block basis, as is necessary for intrastate districting.

amounts of research and resources to improving this performance, at this point its potential success is entirely speculative. It may well be, in spite of the Bureau's best efforts, that minority groups in general will continue to be undercounted to the point that inclusion of illegal aliens in the apportionment base is more a matter of theory than practice. In that event, this court will have decided a constitutional issue, ordered the expenditure of millions of dollars and caused substantial delay in the taking of the census, all with absolutely no effect on the plaintiffs' voting rights. Our jurisdiction may not rest on so ephemeral a possibility of relief.

Since we must assume—again for purposes of standing—that plaintiffs have in fact identified a constitutional error in our national apportionment, we are concerned by the possible objection that if these plaintiffs, at this time, cannot object to the Census Bureau's plans, no one will be able to raise the issue because the necessary data to establish standing will never be gathered. While that possibility is a matter of considerable apprehension to us, we have nevertheless been firmly admonished by the Supreme Court that it makes no difference to the fact that we lack jurisdiction that the case may never be decided if these plaintiffs lack standing. The plaintiff in *United States* v. *Richardson*, 418 U.S. 166 (1974) brought a constitutional challenge to the failure of the CIA to make a "regular Statement and Account" of its expenditures available to the public. The Supreme Court rejected standing based on the plaintiff's status as a citizen and taxpayer, noting that its

decision likely meant that the issue would never be resolved.

> It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts. The Constitution created a *representative* Government with the representatives directly responsible to their constituents at stated periods of two, four, and six years; that the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the "ground rules" established by the Congress for reporting expenditures of the Executive Branch. Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls. Slow, cumbersome, and unresponsive though the traditional electoral process may be thought at times, our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them.

Id. at 181.

We cannot ignore this directive, but in any case, it does not seem to us that this particular issue is forever shielded from exploration. While performing the calculations which would be necessary to show a substantial likelihood that a particular voter from a particular state would benefit

from the relief here sought is indeed a formidable task, it is by no means clear that it will be impossible once the census returns are complete. At that time, it might be possible to show that there is a substantial likelihood that a particular state, and thus a particular plaintiff, has suffered the requisite "concrete injury" required by article III, in that the procedures used have resulted in the loss of one or more congressional seats.[13] If a plaintiff should prevail in a constitutional challenge at that point, we do not believe the courts would be unable to grant effective relief.

Furthermore, there is no assurance that the necessary data will never be gathered by the Census Bureau, though it does not plan to do so now. Congress may request figures on illegal aliens at any time, and the Bureau would then be obliged to use its best efforts to develop accurate figures.[14] We note that the individual plaintiffs who include members of Congress are not without political power and legislative authority; a large number of states and congressional districts are potentially adversely affected by the inclusion of illegal aliens in the apportionment basis. The individual legislators thus have a ready-made forum in which to express their views and seek resolution of the issues involved in this suit.

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[13] We also note that the same litigant who sought review in Sharrow v. Brown, discussed above, had earlier raised a challenge to the Census Bureau's failure to count disenfranchised citizens, and had obtained standing by refusing to complete his census form, raising his constitutional challenge as a defense to the subsequent prosecution. (He lost on the merits.) U.S. v. Sharrow, 309 F.2d 77 (2d Cir. 1962), *cert. denied*, 372 U.S. 949 (1963).

[14] We need not decide whether Congress could, consistent with the fifth amendment, require the Census Bureau to directly ascertain the resident status of individual aliens under threat of punishment should answers be refused. Brief of State of New York at 4.

IV. The Case for Equitable Relief

In light of the shortness of time remaining before the census is underway, and mindful of the fact that the plaintiffs may wish to seek review of our decision, we believe that it would not be imprudent for us also to indicate that we believe the plaintiffs have failed to establish their entitlement to equitable relief at this time. *Cf., O'Shea* v. *Littleton*, 414 U.S. 488 (1974) (after finding no standing, Court went on to find no basis for equitable relief). The defendants have made a convincing showing that forcing it to attempt a separate head count of illegal aliens would be extremely expensive, delay the census by as much as a year, and likely be ineffective in any case. Furthermore, in a recent affidavit filed with this court, the plaintiffs themselves eliminate any possibility of this court's granting injunctive relief at this time. In the Supplemental Affidavit of V. Lance Tarrance, plaintiffs' expert, filed with the plaintiffs' motion for summary judgment, Mr. Tarrance attempts to answer the defendants' objections as to cost and delay:

> [S]everal alternatives avoiding these difficulties suggest themselves. Perhaps the most basic is *reliance only on the citizenship data generated by the questions already appearing on the long form.* These forms will be sent to more than 17 million households nationwide, and, if the practice in 1970 is followed, they will be distributed on a uniform basis throughout the country. These responses will provide data from which the Bureau could, for each census tract, statistically generate an estimate of the number of persons who were born outside the U.S. and are not naturalized citizens, *i.e.*, aliens. Comparing this figure with INS geographic data on legal aliens would then result in a figure on the number of illegal aliens in that census tract. This would involve no reprinting, disassembly of packages, staff retraining or any other of the preparatory steps said to cost $150 million and delay the census for up to a year.

(emphasis added). It thus appears that the plaintiffs would be satisfied with *no change at all* in the proposed census, so long as an estimate of the number of illegal aliens in each census tract is prepared and subtracted from the population base before the apportionment of congressional seats. This effectively eliminates any basis for equitable relief at this time.

Furthermore, at least in the abstract, plaintiff's case appears to be very weak on the merits. The language of the Constitution is not ambiguous. It requires the counting of the "whole number of persons" for apportionment purposes, and while illegal aliens were not a component of the population at the time the Constitution was adopted, they are clearly "persons." By making express provision for Indians and slaves, the Framers demonstrated their awareness that without such provisions, the language chosen would be all-inclusive. According to James Madison, the apportionment was to be "founded on the aggregate number of inhabitants" of each state. *The Federalist*, No. 54, at 369 (J. Cooke ed. 1961). The Framers must have been aware that this choice of words would include women, children, bound servants, convicts, the insane—and aliens, since the same article of the Constitution grants Congress the power "to establish a uniform rule of naturalization." Art. I, section 8, cl. 4. We see little on which to base a conclusion that *illegal* aliens should now be excluded, simply because persons with their legal status were not an element of our population at the time our Constitution was written.

The defendants' interpretation of the constitutional language is bolstered by two centuries of consistent interpretation. The Census Bureau has always attempted to count every person residing in a state on census day, and the population base for purposes of apportionment has always included all persons, including aliens both lawfully and unlawfully within our borders. The issue of the inclusion of aliens in the apportionment base has received explicit congressional attention, both at the time of the adoption of

the fourteenth amendment and more recently. *See, e.g., Cong. Globe,* 39th Cong., 1st Sess. 359 (1866) (remarks of Rep. Conkling). Although the language "the whole number of persons" finally adopted in the fourteenth amendment is identical to the original choice of words in Article I, section 2, other options were considered and expressly rejected, after considerable debate, including the options of "voters" or "citizens." While, as a political matter, the reason seems to have been that any change would have diluted the power of the New England States which had a large number of women and aliens ineligible to vote, *see* Van Alstyne, *The Fourteenth Amendment, The "Right" to Vote, and The Understanding of The Thirty-Ninth Congress,* 1965 S.Ct. Rev. 33 (1965), it was also pointed out during debate that the "non-voting classes" have a vital interest in the conduct of the Government. *Cong. Globe,* 39th Cong., 1st Sess. 141 (1866) (remarks of Rep. Blaine). In any case, it appears indisputable that Congress was aware of the all-inclusive scope of the language it was adopting.

During the first half of this century, a variety of proposals were made to exclude aliens from the apportionment base, and it appears to have been generally accepted that such a result would require a constitutional amendment.[15] See, for example, the 1929 advice from the legislative counsel for the Senate, concluding that statutory exclusion of aliens from the apportionment base would be unconstitutional. 71 Cong. Rec. 1821 (1929). In 1940, in the course of debate of the same issue, the subject of *illegal* aliens was raised. Asked whether "aliens who are in this country in violation of law have the right to be counted and represented," Representative Celler of New York responded:

> The Constitution says that all persons shall be counted. I cannot quarrel with the founding fathers. They said

[15] *See, e.g.,* H.J. Res. 20, 71st Cong., 1st Sess. (1929); H.J. Res. 97, 72d Cong., 1st Sess. (1932).

> that all should be counted. We count the convicts who are just as dangerous and just as bad as the Communists or as the Nazis, as those aliens here illegally, and I would not come here and have the temerity to say that the convicts shall be excluded, if the founding fathers say they shall be included. The only way we can exclude them would be to pass a constitutional amendment.

86 Cong. Rec. 4372 (1940). The proposal to exclude aliens from the population base was rejected.

Furthermore, the plaintiffs' basic premise that the principle of "one person, one vote" is being violated by the inclusion of illegal aliens in the apportionment base is conclusory. They argue that their votes are "worth less' than the votes of citizens of states with large illegal alien populations, but that argument assumes the conclusion that illegal aliens should not be counted, the very question which the plaintiffs seek to have us decide.

In any case, the "one person, one vote" rule, announced and developed in the context of challenges to a state's internal districting, has little to offer us here. While the same underlying principle, equal representation for equal numbers of people, applies to both national apportionment and intrastate districting, the mathematical notion of one person, one vote has no applicability to the national issue.[16] "Equal representation" is only a rough goal in national apportionment, since every state must have at least one

[16] We also note that the phrase itself is inaccurate shorthand for the concept of equal representation for equal numbers of people, insofar as it is possible. State districts drawn strictly on the basis of population would clearly be constitutional, Reynolds v. Sims, 377 U.S. 533, 567 (1964), in spite of the fact that concentrations of non-voting residents in a few districts (such as where prisons or orphanages are located) would make the ballots of voters in those districts more "valuable" than voters' ballots in other districts.

representative, state lines must be respected in allocating congressional seats, and each state has the right to establish its own voting requirements, within constitutional limits.

Finally, we note that plaintiffs' complaint was filed only a few short months before the statutorily required date of the census, when any changes would inevitably result in disruption of the process, delay and expense. Three years ago, Congress was advised of the subjects to be covered, and two years ago it was provided the specific questions which would be asked. There would be no justification for our exercise of equitable powers to respond to plaintiffs eleventh hour challenge to those subjects and questions.

Given these considerations, even if the plaintiffs were able to establish standing to bring this lawsuit, we would be inclined to deny them the relief they seek. Both the equities of the situation and the merits of the case favor the defendants.

V. The Propriety of a Three-Judge Court

This three-judge court was convened pursuant to recently amended 28 U.S.C. 2284 (1976), which now prescribes such courts only "when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." In light of our deliberations and after hearing further argument on the propriety of such a designation, we have concluded that the issue is most likely one for a single district judge. This case does not seem to us to involve an action "challenging the constitutionality of the apportionment of congressional *districts*." *Id.* (emphasis added). Nor did the drafters appear to have intended to cover cases such as this which do not directly affect state reapportionment. See *S. Rep. No.* 93-206, 93rd Cong., 1st Sess. 13 (1973) (revision intended to apply to actions

"challenging the constitutionality of any *statute* apportioning congressional districts" (emphasis added)). Here the challenge is to census practices which will produce data on which the apportionment of House of Representative members to states will be based, not to any state action reapportioning congressional districts. *Cf. Wesberry* v. *Sanders,* 376 U.S. 1 (1964). Somewhat similar challenges in the past to census practices potentially affecting allocations of House members to states have been decided by single judge courts. *See, e.g., Lampkin* v. *Connor,* 239 F. Supp. 757 (D.D.C. 1965), *aff'd on other grounds,* 360 F.2d 505 (D.C. Cir. 1966); *Sharrow* v. *Brown,* 319 F. Supp. 1012 (S.D.N.Y. 1970), *aff'd,* 447 F.2d 94 (2d Cir. 1971); *Borough Bethel Park* v. *Stans,* 319 F. Supp. 971 (W.D. Pa. 1970), *aff'd* 449 F.2d 575 (3d Cir. 1971).

Although we conclude that a three-judge court is not necessary and the issue may properly be decided by a single judge, we are concerned, in view of the imminence of the census which is scheduled to begin within a few weeks, that the case be promptly decided and the parties have time to take an appeal. Hence we have adopted a procedure which has been previously approved by the Supreme Court, *see Swift & Co.* v. *Wickham,* 382 U.S. 111, 114 n.4 (1965); *Query* v. *United States,* 316 U.S. 486, 488 (1942); and cited with approval in our own jurisdiction; *Krebs* v. *Ashbrook,* 275 F. Supp. 111, 119 (1967) (3-judge court, Bazelon, C.J., Fahy, J. & Corcoran, D.J.), *aff'd,* 407 F.2d 306 (1968), *cert. denied,* 393 U.S. 1026 (1969); *cf. Jackson* v. *Choate,* 404 F.2d 910 (5th Cir. 1968). We have reached a unanimous decision disposing of the case on grounds of lack of standing; District Judge Gasch additionally certifies that he individually arrived at the same conclusion that we collectively reached. This is done "out of abundant caution," *Swift & Co.* v. *Wickham,* 230 F. Supp. 398, 410 (S.D.N.Y. 1964), so that in the event we are mistaken, an appeal can still be expeditiously taken in the appropriate forum. *See, Krebs* v. *Ashbrook,* 275 F. Supp. at 119; *Swift & Co.,* at 410.

VI. Conclusion

Since we conclude that the plaintiffs lack standing, and that in any case they have failed to demonstrate that they are entitled to the exercise of our equitable powers, defendants' motion for summary judgment is granted and plaintiffs' motions for preliminary injunction and for summary judgment are denied.

/s/ Patricia M. Wald
Patricia M. Wald
United States Circuit Judge

/s/ Oliver Gasch
Oliver Gasch
United States District Judge

/s/ Barrington D. Parker
Barrington D. Parker
United States District Judge

February 26, 1980

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-3269

Federation For American Immigration Reform (Fair) et al.,
Plaintiffs,

v.

Philip M. Klutznick, Secretary of Commerce, et al.,
Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Received February 27, 1980

Notice is hereby given that the Federation for American Immigration Reform, *et al.*, Plaintiffs in the above-captioned proceeding, hereby appeal to the Supreme Court of the United States from the order denying Plaintiffs' application for preliminary injunction and motion for summary judgment, granting Defendants' motion to dismiss or, in the alternative, for summary judgment, granting the motion of the State, City and Mayor of New York to intervene as Defendants, entering summary judgment for Defendants and Intervenor-Defendants, dismissing the action, and subsequently dissolving the three-judge court con-

vened pursuant to 28 U.S.C. § 2284(a), as entered in this action on the 26th day of February, 1980.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

SCHMELTZER, APTAKER & SHEPPARD, P.C.

By: /s/ GEORGE J. WEINER
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Date: February 27, 1980

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal to the Supreme Court of the United States was served by hand or air mail, postage prepaid, this 27th day of February, 1980 upon the following:

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/s/ GEORGE J. WEINER
George J. Weiner

AMENDED CERTIFICATE OF SERVICE

Filed March 19, 1980

I hereby certify that, pursuant to Rules 33(1) and (2) of the Rules of the Supreme Court, a copy of the attached Notice of Appeal to the Supreme Court of the United States was served upon all parties required to be served, by hand delivery or airmail, postage prepaid, to counsel of record for all parties on the 27th day of February, 1980, as follows:

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APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-3269

FEDERATION FOR AMERICAN IMMIGRATION REFORM (FAIR) ET AL.,
Plaintiffs,

v.

PHILIP M. KLUTZNICK, SECRETARY OF COMMERCE, ET AL.,
Defendants.

ORDER

Upon consideration of plaintiffs' application for injunction pending appeal of this Court's February 26, 1980 order, the memorandum submitted in support thereof, and the entire record herein, it is by the Court this 29th day of February, 1980,

ORDERED that plaintiffs' application for injunction pending appeal of this Court's February 26, 1980 order be, and hereby is, denied.

/s/ OLIVER GASCH
Judge

Supreme Court, U. S.
FILED
MAY 23 1980
MICHAEL RODAK, JR., CLERK

No. 79-1588

In the Supreme Court of the United States

OCTOBER TERM, 1979

FEDERATION FOR AMERICAN IMMIGRATION REFORM, ET AL., APPELLANTS

v.

PHILIP M. KLUTZNICK, Secretary of Commerce, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF THE FEDERAL APPELLEES TO DISMISS OR AFFIRM

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1588

FEDERATION FOR AMERICAN IMMIGRATION REFORM, ET AL., APPELLANTS

v.

PHILIP M. KLUTZNICK, Secretary of Commerce, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF THE FEDERAL APPELLEES TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, the Solicitor General, on behalf of the federal appellees, moves that this appeal be dismissed or, in the alternative, that the judgment of the three-judge district court be affirmed.

OPINION BELOW

The opinion of the district court (J.S. App. 3a-30a) is not yet reported.

JURISDICTION

The judgment of the district court was entered on February 26, 1980 (J.S. App. 1a-2a). A notice of appeal was filed on February 27, 1980. The jurisdictional statement was filed on April 10, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction under 28 U.S.C. 1253 over an appeal from an order of a three-judge district court dismissing an action on standing and jurisdictional grounds.

2. Whether appellants have standing to challenge the manner in which the 1980 census is conducted.

3. Whether illegal aliens residing in this country are properly included in the census.

STATEMENT

1. Article I, Section 2, Clause 3 of the Constitution, as amended by Section 2 of the Fourteenth Amendment, mandates that the members of the House of Representatives "be apportioned among the several States * * * according to their respective Numbers, which shall be determined * * * every subsequent Term of ten Years, in such Manner as [Congress] shall by law direct." Pursuant to this authority, Congress directed the Secretary of Commerce (through the Bureau of the Census) to conduct a census of the population on April 1, 1980. See 13 U.S.C. 141(a). In accordance with prior practice, the Bureau is attempting to count all persons residing in each state, without regard to the lawfulness of their presence in this country.[1] The Bureau, which must complete the census by December 31, 1980, is currently tabulating the census data. See 13 U.S.C. 141(b).

On December 5, 1979, less than four months prior to the commencement of the 1980 census, appellants filed this suit for declaratory and injunctive relief.[2] Appellants claimed that, insofar as the Bureau proposes to count illegal as well as legal aliens, the 1980 census would violate the Constitution, the Census Act, 13 U.S.C. 1 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. 706(2). Appellants argued that the unlawful inclusion of illegal aliens in the census count would inflate the population of those urban areas and states that have high concentrations of illegal aliens. According to appellants, the 1980 census would thus result in the malapportionment of an unknown number of congressional seats and also state legislatures that base their apportionment on the census. In addition, appellants contended that those states and localities with relatively small populations of illegal aliens would lose an unknown amount of federal money, because numerous federal programs

---

[1] More than two years prior to the commencement of the 1980 census, the Bureau informed Congress of all proposed questions and topics. See 13 U.S.C. 141(f). These submissions made clear that the Bureau intended to count every person residing in a state, including illegal aliens (J.S. App. 28a).

[2] Appellants are the Federation For American Immigration Reform, the Committee for Representative Government, and 26 federal legislators.

allocate funds according to the census figures. Appellants requested that a three-judge district court be convened to consider their claims. See 28 U.S.C. 2284 (a).

2. a. Both sides moved for summary judgment, and on February 26, 1980, a three-judge district court granted the government's motion for summary judgment, dismissed appellants' complaint, and dissolved the three-judge court. The court first concluded (J.S. App. 9a-23a) that appellants lack standing to challenge the manner in which the Bureau of Census proposed to conduct the 1980 census. The court found that, even assuming that illegal aliens should not be counted in the census, it is not possible, given the uncertainties of the general population shifts and the size and location of the illegal alien population, to ascertain which, if any, of the individual appellants would suffer a loss in representation as a result of the census (*id.* at 13a). Because none of the appellants could "allege that the weight of his or her vote in the next decade [would] *be affected* by the expected method of taking the census and apportioning congressional seats" (*ibid.*; emphasis in original), appellants failed to demonstrate a concrete injury in fact (*id.* at 13a-19a).[3]

The court held that applicants lacked standing for still another reason. Citing *Duke Power Co.* v. *Caro-*

[3] The court stated (J.S. App. 12a n.9) that appellants certainly had no standing to present a "blunderbuss attack" on Congress' decision to use the census (including illegal aliens) in allocating federal funds.

lina Environmental Study Group, Inc., 438 U.S. 59, 74 (1978), the court stated that appellants had failed to show that "the relief they seek will redress the injury they assert" (J.S. App. 20a). The court pointed out that the Bureau has no reliable method of calculating the number of illegal aliens and that one of the methods proposed by appellants, when applied to the 1970 census results, produced a total illegal alien population of *minus* 623,000 (*ibid.*). The court also noted that, in light of the complexity of the immigration laws, it was virtually impossible to define "illegal alien" for census purposes (*id.* at 20a-21a n.12). Moreover, the court recognized that because even the latest census techniques may result in the underreporting of lawful aliens and minority groups, the counting of illegal aliens might not in any event result in malapportionment (*id.* at 21a). The court concluded that (*ibid.*):

> In that event, this court will have decided a constitutional issue, ordered the expenditure of millions of dollars and caused substantial delay in the taking of the census, all with absolutely no effect on the [appellants'] voting rights. Our jurisdiction may not rest on so ephemeral a possibility of relief.

Furthermore, the court suggested that this suit did not present a ripe case or controversy (J.S. App. 22a-23a). It observed that even after the census was complete, it would be difficult to ascertain whether the inclusion of illegal aliens had adversely affected

any particular individual's voting representation. Nonetheless, the court stated that "[a]t that time, it might be possible to show that there is a substantial likelihood that a particular state, and thus a particular plaintiff, has suffered the requisite 'concrete injury' required by article III, in that the procedures used have resulted in the loss of one or more congressional seats" (*id.* at 23a).

b. The court also indicated (J.S. App. 24a-28a) that even if they had standing, appellants would not be entitled to equitable relief. The court concluded that the public interest in permitting the census to go forward substantially outweighed appellants' eleventh hour claim of irreparable harm. In addition, the court observed that "[appellants'] case appears to be very weak on the merits" (*id.* at 25a). The court explained that the all-inclusive language [4] and the history of the Constitution show that illegal aliens are to be counted in the census. In particular, the court relied on the fact that the Congress that proposed the Fourteenth Amendment and subsequent Congresses have assumed that the census includes all aliens (*id.* at 25a-26a). The court also noted that for two hundred years the Bureau has attempted to count every resident, including illegal aliens and numerous other groups (such as women, convicts, and the insane), who at one time or another have been

[4] Section 2 of the Fourteenth Amendment, which supplanted in part the apportionment provision of Article I, provides that the census shall include "the whole number of persons in each State."

disfranchised or otherwise legally disabled (*id.* at 25a).

c. Finally, the court decided that there was no basis for convening a three-judge district court and that appellants' claim should have been considered by a single district judge. The court explained that 28 U.S.C. 2284(a) requires a three-judge district court only "when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." Looking to the language and legislative history of the statute, the court found that an action challenging census practices is not an apportionment case within the meaning of 28 U.S.C. 2284(a). See J.S. App. 28a-29a.[5] Accordingly, the court ordered the three-judge court dissolved.

ARGUMENT

1. This case does not fall within the Court's appellate jurisdiction under 28 U.S.C. 1253. The three-judge district court did not decide the merits of appellants' challenge to the census. Rather, it ruled that appellants lack standing to contest the manner in which the census is taken and also that such a challenge is not a case involving the "constitutional-

[5] In order to expedite the litigation and out of an abundance of caution, Judge Gasch specifically certified that he agreed with the conclusions of the three-judge court. See *Swift & Co.* v. *Wickham*, 382 U.S. 111, 114 n.4 (1965). Subsequently, on February 29, 1980, Judge Gasch denied appellants' request for an injunction pending appeal, and on March 17, 1980, this Court also denied appellants' application for a stay of the census pending appeal (No. A-747).

ity of the apportionment of congressional districts" within the meaning of the three-judge court statute. See 28 U.S.C. 2284(a). In our view, the court's analysis of these issues is correct. But even if the court erred both as to appellants' standing and as to the propriety of convening a three-judge court, it is well settled that "a direct appeal will lie to this Court under § 1253 from the order of a three-judge federal court denying interlocutory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim presented below." *MTM, Inc.* v. *Baxley*, 420 U.S. 799, 804 (1975). Accordingly, where, as here, the three-judge court merely decides questions of standing and jurisdiction, appeal lies only to the court of appeals. See, *e.g.*, *MTM, Inc.* v. *Baxley, supra* (abstention); *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90 (1974) (standing); *Mengelkoch* v. *Industrial Welfare Comm'n*, 393 U.S. 83 (1968) (jurisdiction); *Wilson* v. *City of Port Lavaca*, 391 U.S. 352 (1968) (jurisdiction).

Furthermore, appellants must now seek review in the court of appeals instead of this Court because the three-judge court determined that appellants' case was properly heard by a single judge and therefore dissolved itself (J.S. App. 2a, 28a-29a). As this Court explained in *Wilson* v. *City of Port Lavaca, supra*, "[t]he resulting situation is similar * * * to that which results when a single judge declines to convene a three-judge court and denies relief: an appeal lies to the appropriate United States Court

of Appeals, and not to this Court." 391 U.S. at 352. Thus, even assuming that the three-judge court incorrectly dissolved itself,[6] this Court lacks jurisdiction to consider appellants' claims at this time. Accord, *Mengelkoch* v. *Industrial Welfare Comm'n, supra;* R. Stern & E. Gressman, *Supreme Court Practice* § 2.14(5)(d), at 109-110 (5th ed. 1978).

Appellants nonetheless argue (J.S. 17-18) that this case is distinguishable from the authorities discussed above "by reason of the fact that the three judges below considered not only FAIR's standing but also the merits of the Constitutional claims." This argument is both factually and legally without merit. First, in *Mengelkoch* v. *Industrial Welfare Comm'n, supra*, the lower court concluded that the plaintiffs' constitutional claims were insubstantial

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[6] The court below correctly concluded that appellants' suit does not fall within the purview of 28 U.S.C. 2284(a). That statute authorizes the convening of a three-judge court only "when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." 28 U.S.C. 2284(a). Here, appellants do not challenge any actual "apportionment." Rather, they contest certain census practices that might ultimately affect the allocation of congressional seats among and within the states and that might be used by state legislatures to apportion various legislative districts. Such an indirect and premature attack on future apportionment does not satisfy the narrow terms of Section 2284(a). See S. Rep. No. 94-204, 94th Cong., 1st Sess. 12 (1975); S. Rep. No. 93-206, 93d Cong., 1st Sess. 13 (1973) ("Subsection (a) would also continue the requirement for a three-judge court in cases challenging the constitutionality of *any statute apportioning* congressional districts or apportioning any statewide legislative body") (emphasis supplied).

and it therefore dissolved the three-judge court. See 284 F. Supp. 950, 953-956 (C.D. Cal. 1968). Even though the three-judge court had thus considered the merits of the plaintiffs' constitutional argument, this Court unanimously reaffirmed that "when, as here, a three-judge court dissolves itself for want of jurisdiction, an appeal lies to the appropriate Court of Appeals and not to this Court." 393 U.S. at 83-84. Moreover, although here the lower court did indicate that appellants' claim appeared to be without merit, its order in no sense "rests upon resolution of the merits of [appellants'] constitutional claim * * *." *MTM, Inc.* v. *Baxley, supra,* 420 U.S. at 804.

Appellants further suggest (J.S. 18-19) that this Court should reconsider its prior decisions concerning direct appeals from three-judge district courts, because those cases were decided before Congress amended the three-judge court statutes in 1976. See Pub. L. No. 94-381, 90 Stat. 1119. At that time, however, Congress merely repealed many of the provisions that required the convening of three-judge courts; Congress purposefully did not amend 28 U.S.C. 1253, the jurisdictional provision at issue here. See S. Rep. No. 94-204, 94th Cong., 1st Sess. 3, 4-5, 7, 10-12 (1975); S. Rep. No. 93-206, 93d Cong., 1st Sess. 4-5, 6-7, 10-11 (1973). Indeed, the Senate Report accompanying the original bill expressly recognized that " '[i]f a three-judge court is convened, but it determines that three judges were not necessary, appeal is to the court of appeals.' " S. Rep. No. 93-206, *supra,* at 6 (quoting Prof.

Charles Wright with approval). And the legislative history as a whole evidences a clear congressional purpose to alleviate the burden of direct appeals on this Court, and not, as appellants contend, to liberalize the requirements of direct appeals in a limited class of cases. See S. Rep. No. 94-204, *supra,* at 3, 4-5; H. R. Rep. No. 94-1379, 94th Cong., 2d Sess. 4 (1976); S. Rep. No. 93-206, *supra,* at 3 (quoting remarks of the Chief Justice).

This appeal should therefore be dismissed for lack of jurisdiction. Because appellants have also filed a protective notice of appeal to the court of appeals (J.S. 13 n.4), there is no need to vacate the judgment below to allow the district court to enter a fresh decree. Compare *Wilson* v. *City of Port Lavaca, supra.*

2. If the Court disagrees with our jurisdictional submission, then the judgment of the district court should be affirmed because, as we demonstrate below, appellants' claims are plainly insubstantial.

a. As the district court concluded (J.S. App. 11a-23a), this dispute does not present an Article III case or controversy. In light of the myriad of factors affecting the census, including population shifts and the underreporting of minorities and lawful aliens, it is far from evident that a reapportionment based on a census including illegal aliens would deprive appellants of any voting rights, even if it is assumed that illegal aliens should not be counted in the census. In other words, the inclusion of illegal aliens in the census count might well be cancelled out by the sub-

stantial underinclusion of minorities and lawful aliens residing in the same area. See *id.* at 21a. Moreover, it is certainly true that, until the census is taken, it is impossible to ascertain whether any particular appellant will be deprived of voting representation. Because "*none* of the [appellants] are able to allege that the weight of his or her vote in the next decade *will be affected* by the expected method of taking the census" (*id.* at 13a; emphasis in original), none of the appellants has shown the requisite "injury in fact" necessary to establish standing at this time. See *Warth* v. *Seldin*, 422 U.S. 490, 501-508 (1975); *O'Shea* v. *Littleton*, 414 U.S. 488, 493-499 (1974); *Daughtrey* v. *Carter*, 584 F.2d 1050, 1056-1057 (D.C. Cir. 1978) (no standing to challenge voting by illegal aliens); *Sharrow* v. *Brown*, 447 F.2d 94 (2d Cir. 1971), cert. denied, 405 U.S. 968 (1972) (no standing to challenge census); *Lampkin* v. *Connor*, 239 F. Supp. 757, 760-763 (D.D.C. 1965) (no standing to challenge census), aff'd on other grounds, 360 F.2d 505 (D.C. Cir. 1966).[7]

[7] In addition, the court below recognized that appellants lack standing because there is no " 'substantial likelihood' that the relief requested will redress the injury claimed * * *." *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 75 n.20 (1978). See also *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 262 (1977); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 425 U.S. 26, 38 (1976); *Warth* v. *Seldin*, *supra*, 422 U.S. at 504. There is often no simple method to determine an alien's legal status without a full hearing (cf. 8 U.S.C. 1251), and there is little possibility that a census question requesting that illegal aliens identify themselves as such would be accurately answered. Finally, appellants' proposed statistical analysis of the raw data to be collected is highly imprecise. Indeed, application of their method to the 1970 census produced the absurd conclusion that there were minus 623,000 illegal aliens in the country. See J.S. App. 20a.

b. Appellants' claim (J.S. 19-25) regarding the inclusion of illegal aliens in the census does not warrant plenary review by this Court. Article I, Section 2, Clause 3 of the Constitution broadly provides that the census includes the "whole Number of free Persons" in each state, except for untaxed Indians and slaves.[8] As the court below pointed out (J.S. App. 25a), the fact that the Framers specifically excepted two groups from the scope of the Census Clause strongly supports the conclusion that all other persons, including aliens, fall within the inclusive language of the provision. To be sure, there were no illegal aliens at the time the Constitution was written. But the Constitution itself authorized Congress to enact laws concerning immigration and naturalization (Art. I, Sec. 8, Cl. 4), and the constitutional debates make clear that Congress was to be apportioned "by the number of the State's *inhabitants*." *Wesberry* v. *Sanders*, 376 U.S. 1, 13 (1964) (emphasis supplied). See *The Federalist* No. 54, at 369 (J. Cooke ed. 1961).

[8] Slaves were to be counted as three-fifths of a person. Of course, that portion of Article I was repealed by Section 2 of the Fourteenth Amendment.

Moreover, the history and language of the Fourteenth Amendment squarely refute appellants' contentions. This Court has repeatedly concluded that an illegal alien is a "person" within the ambit of Section 1 of the Fourteenth Amendment (see, *e.g.*, *Mathews* v. *Diaz*, 426 U.S. 67, 77 (1976); *Wong Wing* v. *United States*, 163 U.S. 228, 238 (1896); *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886)), and appellants suggest no reason why an illegal alien should be considered a "person" for purposes of Section 1 of the Fourteenth Amendment but not for Section 2. To the contrary, the congressional debates show that Congress purposefully adopted the inclusive phrase "whole number of persons in each State" while specifically rejecting more restrictive alternatives such as "citizens" or "voters." See Cong. Globe, 39th Cong., 1st Sess. 9-10, 141, 359, 535, 2804 (1866); J.S. App. 25a-26a. For example, Representative Conkling observed that the exclusion of aliens from the apportionment base would "cause considerable inequalities * * *, because the number of aliens in some States is very large." Cong. Globe, 39th Cong., 1st Sess. 359 (1866).

Finally, for two hundred years, the Bureau of the Census and its predecessors have consistently counted all residents in the United States, regardless of whether they are mental incompetents, convicts, illegal aliens, or otherwise legally disabled persons. See J.S. App. 25a. Congress has repeatedly approved this settled administrative practice, particularly with regard to persons "in this country in violation of

law." 86 Cong. Rec. 4372 (1940) (colloquy between Reps. Rankin and Celler). See, *e.g.*, 71 Cong. Rec. 1821-1822 (1929) (remarks of Sen. Vandenberg); *Hearings on H.J. Res. 20, 101, 356, and 484 Before the House Comm. on the Judiciary*, 71st Cong., 3d Sess. (Serial 16) 27 (1931); 86 Cong. Rec. 4371-4372 (1940). In fact, Congress held extensive hearings regarding the 1980 census and was fully aware that the Bureau intended to count all persons, including illegal aliens. See, *e.g.*, *Economic and Social Statistics for Spanish-Speaking Americans: Hearings on H.J. Res. 406 Before the Subcomm. on Census and Statistics of the House Comm. on Post Office and Civil Service*, 93d Cong., 2d Sess. 23-25, 33, 35, 82-83 (1974); *The Census Undercount Problem: Hearing Before the Subcomm. on Commerce, Consumer, and Monetary Affairs of the House Comm. on Government Operations*, 96th Cong., 1st Sess. 19, 23-25, 29-31 (1979).

CONCLUSION

The appeal should be dismissed for lack of jurisdiction. If the Court concludes that the appeal is proper under 28 U.S.C. 1253, the judgment of the district court should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1588

FEDERATION FOR AMERICAN IMMIGRATION REFORM, *et al.*,
Appellants,

—against—

PHILIP M. KLUTZNICK, *et al.*,
Appellees,

—and—

THE STATE OF NEW YORK, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION OF THE STATE OF NEW YORK, *ET AL.*, TO DISMISS OR AFFIRM

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—and—

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF THE STATE OF NEW YORK, *ET AL.*, TO DISMISS OR AFFIRM

Appellees the State and City of New York and Mayor Edward I. Koch, intervenors in the court below, move to dismiss the appeal because it is not within the jurisdiction of this Court, or to affirm the judgment below because the questions presented are so unsubstantial as not to require further argument.

STATEMENT[1]

Less than four months before the start of the 1980 Census, appellants sued several federal officials who are charged with conducting the decennial enumeration of our nation's population. Appellants sought to overturn the Census Bureau's settled practice of attempting to count all persons in the United States on Census Day, a practice based on nearly 200 years of constitutional history. Appellants claimed that various of their constitutional rights were violated by inclusion in the Census population totals of so-called "illegal aliens" residing in the United States. Although appellants never proposed any practical method to effect the relief they sought (and indeed, repeatedly changed their description of that relief), they now demand that the Census Bureau somehow be enjoined from including "illegal aliens" in the population totals.

The Constitution mandates the use of Census figures to apportion Representatives in Congress among and within the states. Census totals are also used by the states to apportion their own legislatures. In addition, over 100 Federal grant programs allocate funds based in part on Census figures. The gist of appellants' claims is that including "illegal aliens" in the Census totals will inflate the population of certain urban areas and states thought to have high concentrations of "illegal aliens". Appellants claim that this will result in legislative malapportionment and distribution of Federal aid funds in violation of the Constitution.

A three-judge district court was convened below, appellants claiming that the action was one "challenging the apportionment of congressional districts" under 28 U.S.C. § 2284(a). The New York appellees intervened as of right. *See* J.S. App. at 2a.[2] We showed that the relief sought by

[1] Since the Federal appellees are also filing a motion to dismiss or affirm, we will limit the discussion in this memorandum to points that we believe will be of particular additional assistance to the Court in ruling upon the appeal.

[2] The intervening appellees are The State of New York, The City of New York, and Mayor Edward I. Koch, appearing in both his official capacity and as an individual citizen, taxpayer and voter.

appellants would directly injure our political and economic interests. Fed. R. Civ. P. 24(a). If appellants were to prevail, New York would, on appellants' theory, lose representation in Congress and Federal aid funds vital to its economic recovery. Moreover, we presented uncontradicted evidence in the court below showing that any attempt in the Census to distinguish "illegal aliens" from the rest of the population would sharply increase the large undercount of minority citizens and "lawful" aliens who form a relatively high proportion of New York's population.[3] Thus, we showed that the effect of the relief sought would be to reduce the Census count of persons in New York whom even appellants agree must be counted. Such an increase in the undercount would itself violate the Constitutional requirement that representation in Congress must be based upon "the whole number of persons in each State".

On cross-motions for summary judgment, the district court ruled in favor of the New York and the Federal appellees, dismissed the complaint and dissolved the three-judge court. The court held that appellants lacked standing to bring this action. The court also discussed appellants' claims for equitable relief, stating that their case was "very weak on the merits", J. S. App. 25a, and that other equitable considerations militated against relief, even assuming that appellants had standing.

[3] For example, as the Census Bureau has admitted, the undercount rate in the 1970 Census was four times as high for Blacks as for whites, and one out of every eight Black males over age 20 was not enumerated. Our evidence showed that the undercount rate for other minorities and "lawful" aliens was probably at least as high.

We also showed that the general distrust of minorities and aliens for governmental prying into their lives—which is one of the reasons for the disproportionality of the undercount—would be exacerbated if any overtone of enforcement of the immigration laws were combined with the census counting process. For the recently-arrived Jewish immigrant from the Soviet Union or the political refugee from Cuba, for example, personal questions (particularly as to legal status) posed by any government official are not likely to appear benign.

ARGUMENT

I

THIS COURT LACKS JURISDICTION OVER THE APPEAL

Settled rules developed under the three-judge court statutes repealed in 1976 (former 28 U.S.C. §§ 2281, 2282) bar a direct appeal under 28 U.S.C. § 1253 in this case.

A direct appeal would not lie where, as here, a three-judge court holds that plaintiffs seeking injunctive relief lack standing. *Gonzalez v. Employees Credit Union,* 419 U.S. 90, 91 (1974). *See also, MTM, Inc. v. Baxley,* 420 U.S. 799, 804 (1975).[4]

Alternatively, where, as here, a three-judge court dissolves itself after a finding that it lacks jurisdiction because the issue is one properly decided by a single judge, appeal lies only to the court of appeals. *See, e.g., Mengelkoch v. Industrial Welfare Comm'n,* 393 U.S. 83 (1968); *Wilson v. City of Port Lavaca,* 391 U.S. 352 (1968); *Swift & Co. v. Wickham,* 382 U.S. 111, 128-29 (1965).

Appellants argue that these clear precedents should be disregarded because they are inapplicable to the new section 2284(a). In repealing the old three-judge court statutes, however, Congress pointedly did not change section 1253. Section 1253, and not the three-judge court acts, is the basis for this Court's jurisdiction. Accordingly, it is clear that Congress did not intend to alter this Court's rulings on its own jurisdiction to review three-judge court cases.

In any event, however, section 1253 by its own terms does not apply here since, as held below, the case was not "required" to be determined by a three-judge court. *See Gonzalez* v. *Employees Credit Union, supra,* 419 U.S. at 100-01 and n.19.

[4] While the district court did discuss the merits of appellants' claims, it found that the standing issue was "dispositive of this case". J. S. App. 10a. *See also, Id.* at 4a.

This is not an action "challenging the constitutionality of the apportionment of congressional districts", as section 2284(a) requires. There has as yet been no "apportionment of congressional districts" based upon the 1980 Census. While appellants cite ambiguous language from the legislative history referring to "any case involving congressional reapportionment", Jur. St. at 16, they ignore the specific statement that the requirement for a three-judge court was retained only "in cases challenging the constitutionality of any *statute* apportioning congressional districts". S. Rep. No. 94-204, 94th Cong., 2d Sess., at 12, 1976 U.S. Code Cong. & Ad. News 1988, 2000 (emphasis added). This is, of course, consistent with the repealed acts, which required three-judge courts only for challenges to the enforcement of state or federal statutes.

Indeed, appellants' argument that this is an "apportionment" case at all proves too much. They claim that their attack on census procedures should be viewed as a challenge to part of the "apportionment process". Jur. St. at 16. But myriad administrative decisions (for example, how to word Census questions, whether to mail questionnaires or to send census takers to each dwelling, etc.) arguably have an impact on the outcome of the census enumeration, and thus, the apportionment "process". It is inconceivable that Congress, which revised the three-judge court statutes in order to limit such jurisdiction, *see, e.g.,* S. Rep. No. 94-204, *supra,* at 3, 1976 U.S. Code Cong. & Ad. News at 1990, could have intended that section 2284(a) would apply whenever such administrative decisions are challenged.

II

THE APPEAL ALSO PRESENTS NO SUBSTANTIAL QUESTION REQUIRING FURTHER ARGUMENT

Even if this appeal were within the Court's jurisdiction, the questions presented are, on this record, so unsubstantial as not to require any further argument.

1. *This case is not a proper vehicle to resolve the issues that appellants claim to present.* Even apart from questions of standing,[5] appellants do not present a fit case for resolution by this Court. First, during the course of this litigation, appellants have been unable to describe any practicable change in Census procedures that would satisfy their interpretation of the Constitution. They successively proposed at least three different emergency changes in the Census before the April 1 Census Day, all of which were unworkable.[6] Now that Census Day has passed, the injunctive relief that appellants sought with respect to Census questionnaires is no longer of any use. Yet they persist in pursuing injunctive relief in their Jurisdictional Statement without ever saying what it is that this Court can actually do now to remedy the alleged wrong.

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[5] Appellants' standing is discussed by the Federal appellees and was the basis for the district court's holding. We will not repeat those arguments.

[6] One insurmountable practical (and legal) difficulty is, of course, the fact that there is no such thing as an "illegal alien" under the laws of the United States. Aliens in the United States have a right under the Due Process Clause to remain here—and hence their presence is "legal"—until they are found deportable upon a showing of "clear, unequivocal, and convincing evidence". *Woodby* v. *Immigration Naturalization Service,* 385 U.S. 276, 286 (1966). The determination of deportability requires resolution of many complex and arcane questions of fact and law that may only be made initially by the Attorney General or his designee. Even then, the Attorney General has broad authority to suspend or withhold deportation. A few questions on a census form could not possibly form a basis for accurately making these determinations, even assuming such questions would be answered honestly.

Second, over the last several years, the Census Bureau has repeatedly discussed its planned conduct of the 1980 Census with the Congress. There were extensive oversight hearings, covering even the specific questions to be asked, as well as the plans to count all persons including "illegal aliens". All of the individual appellants are Senators or Members of Congress. Yet they waited until just months before Census Day to file suit, when it was too late to make any changes without enormous disruption, delay and expense. *See* J. S. App. at 28a.

Third, while appellants styled this suit as an attack on Census procedures, it is clear that their real grievance is not with those procedures at all. Rather, appellants are disturbed by what they see as the failure of the Federal Government to carry out its responsibility to enforce the immigration laws. But any policy decision as to whether the Federal Government should more stringently enforce the immigration laws is committed neither to states like New York, where many "illegal aliens" may live and use public services, nor to the courts, but to Congress and the Executive Branch. In short, "the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government," *Mathews* v. *Diaz,* 426 U.S. 67, 81 (1976), and appellants may not turn to this Court when they have failed in the proper forums.

2. *The plain language of the Enumeration Clause.* The result in this case is controlled by the unambiguous language of section 2 of the Fourteenth Amendment. That provides:

> "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of *persons in each State,* excluding Indians not taxed." (emphasis supplied)

In all of their contrived political science theories, appellants have never met the fundamental issue here—that an individual does not have to prove his or her legal status, by possession of a "green card" or otherwise, in order to be a "person" "in" a state.

As they have throughout this litigation, appellants continue to confuse the clear language of the Enumeration Clause—which defines the population that must be used to apportion Representatives—with Constitutional directives concerning the electoral process itself. Thus, they claim that the issue here is whether "illegal aliens" are part of "'the People *of* the several States' secured by [the first sentence of] Article I, § 2 in the right of equal access to representative government." Jur. St. at 19 (emphasis supplied). But the first sentence of Article I, section 2 does not mandate or define a census. Its function—and the purpose of the reference to "Members chosen . . . by the People of the several States"—is to make the House of Representatives a popularly elected body.[7] The Framers knew that state franchise laws in 1789 excluded all but a small fraction of the "people of" each state from eligibility to vote. Yet they required Representatives to be "apportioned . . . according . . . to the whole Number of free Persons . . . ." The Framers thus intended the weight of one vote in a state having a higher proportion of nonvoting "persons" to be greater than one vote in a state having a smaller proportion. *See* p. 9 *infra.*

3. *The context of the Enumeration Clause.* When the Framers of the Constitution intended to exclude from enumeration a particular class of persons, they did so explicitly. Thus, "Indians not taxed" were specifically excluded, and slaves were specifically to be counted only as three-fifths of a person prior to the Fourteenth Amendment. In the face of such language, there is no basis for appellants' demand that this Court create another exception.

[7] Similarly, the verbal formulation originally used to describe the election of Senators provided that the Senators for each state were "chosen by the Legislature thereof". U.S. Const., Article I, section 3. When the Constitution was amended in 1913 to require popular election of Senators, a verbal formulation similar to the first sentence of Article I, section 2, was used to distinguish popular election from election by the legislatures: Senators from each state were to be "elected by the people thereof." U.S. Const., Amend. XVII.

4. *The contrast between the inclusive words of the Enumeration Clause and more limited language in adjacent clauses.* The Fourteenth Amendment itself carefully distinguishes between the broad term "persons" (used in section 2), and the narrower term "citizen" (used in part of section 1). Article I of the Constitution, as originally adopted, drew similar distinctions.

5. *The history of the adoption of the Constitution and the Fourteenth Amendment.* As we showed in detail in our briefs below, the theories of representation put forward in America from the Declaration of Independence to the Constitutional Convention, the circumstances of the "Great Compromise" at the Convention, and contemporaneous explanations of the Constitution by its Framers, all reinforce the conclusion that, when the Enumeration Clause required a count of the "whole Number of free persons", it indeed meant *all* free persons. As put by James Madison, it was a "fundamental principle" that the number of representatives allotted to the several states "is to be determined by a federal rule founded on the aggregate number of inhabitants." *The Federalist* (J. Cooke ed. 1967), No. 54, at 369.[8]

The history of the adoption of the Fourteenth Amendment also stands squarely against appellants. The Thirty-Ninth Congress explicitly considered, and rejected, proposals to change the basis of apportionment from the all-inclusive term "persons" to the narrower term "voters". It was specifically argued then that changing the historical apportionment base would be unjust because "many of the large States held their representation [in the House] in part by reason of their aliens". *Cong. Globe,* 39th Cong., 1st Sess., at 359 (1866). *See also,* J. S. App. at 26a.

6. *Subsequent interpretation of the Constitution.* Precisely the result sought by appellants here has thrice been urged upon

[8] The significance of the "aggregate number of inhabitants" principle is heightened by the fact that, as Madison recognized, in the earliest days of our Nation, some 80 percent of the inhabitants of the states were not entitled to vote. *The Federalist, supra,* No. 57, at 388.

the Congress and thrice been rejected by it. *See* J. S. App. at 26a-27a. On all three occasions, Congress understood that a constitutional amendment would be required to exclude from the census count all aliens and even persons "in this country in violation of law". *See, e.g.,* 86 *Cong. Rec.* 4372 (1940) (remarks of Representative Celler).

This Court's intrastate apportionment decisions simply are not relevant to the allocation of seats in Congress among the several states.[9] However, where this Court has spoken, in dicta, about Congressional apportionment among the states, it has interpreted Article I, section 2, as requiring national apportionment on the basis of each State's total population:

> "The debates at the Convention make at least one fact abundantly clear: that when the delegates agreed the House should represent 'people' they intended that in allocating Congressmen the number assigned to each State should be determined solely by the number of the State's inhabitants. The Constitution embodied Edmund Randolph's proposal for a periodic census to ensure 'fair representation of the people', an idea endorsed by Mason as assuring that 'numbers of inhabitants' should always be the measure of representation in the House of Representatives." *Wesberry v. Sanders,* 376 U.S. 1, 13-14 (1964).

[9] As this Court has recognized, the system of state representation in the national Congress, including, among other things, provision for two senators and at least one representative for each state regardless of its population, is one "ingrained in our Constitution, as part of the law of the land" and "conceived out of compromise and concession indispensable to the establishment of our federal republic". *Reynolds* v. *Sims,* 377 U.S. 533, 574-76 (1964). Thus, no valid analogy can be drawn between apportionment of representation in Congress and intrastate legislative apportionment. *See also, Maryland Committee* v. *Tawes,* 377 U.S. 656, 675 (1964); *Roman* v. *Sincock,* 377 U.S. 695, 708-09 (1964); *Lucas* v. *Colorado General Assembly,* 377 U.S. 713, 738 (1964).

In any event, appellants' argument that their votes are diluted by inclusion of "illegal aliens" is circular. It assumes the very result sought by this suit—that such persons should not be counted. *See* J.S. App. at 27a.

7. ***It is fundamentally just to include all persons in a state in apportionment population totals.*** Appellants have suggested that it is somehow inherently unfair to base a state's representation in Congress upon population totals that may include "illegal aliens". Even assuming that "fairness" is properly considered in a case where the plain language of the Constitution controls, appellants still are wrong.

States that may have large numbers of "illegal aliens" are not responsible for the presence of these persons in the United States. The Federal Government bears the exclusive responsibility for enforcement of the immigration laws. *See, e.g., DeCanis v. Bica,* 424 U.S. 351, 354 (1976). Yet the states and cities must bear the burdens of the general government services used by every person within their borders. For example, the costs of providing police, fire, sanitation, education, highways, mass transit, and parks and recreation are increased by "illegal aliens" as much as by citizens.

Justice demands that those states which, because of default by the Federal Government in enforcing the immigration laws, bear almost the sole burden of a major national problem —"illegal aliens"—should be given greater representation in Congress, the one political body that can solve that problem. And it is fair that the taxpayers of those states should have Congressional representation to ensure that Federal aid programs are based on total population, thereby relieving those taxpayers of some of the burden that they carry for the entire country.

Finally, it would not be just for this Court to depart from the principles of the "Great Compromise", in which a bargain (reaffirmed by the Fourteenth Amendment) was struck by sovereign states in forming our nation. That agreement requires apportionment based on all "persons in" each state.[10]

[10] Indeed, because Congress must be apportioned on the basis of all "persons in each State", serious constitutional questions are raised by the existence of the large census undercount. The Census Bureau acknowledges its failure to enumerate all "persons", and particularly serious constitutional questions are posed by the disproportionate undercount of minorities and aliens. *Cf. Young* v. *Klutznick,* Civil Action No. 80-71330 (E.D. Mich., filed April 2, 1980), an action seeking to require that the 1980 Census include the estimated undercount in the population totals used for apportionment.

CONCLUSION

We recognize that Congress has promulgated rules regulating who may enter and remain in this country, and that more people escaping poverty and repression want to come here than the rules allow. But the means to solve that problem lie in the hands of Congress and the Executive. It is not proper to ask this Court to amend the Constitution where Congress has repeatedly refused to do so.

The appeal should be dismissed for lack of jurisdiction or the judgment should be affirmed.

May 27, 1980

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1588

FEDERATION FOR AMERICAN IMMIGRATION REFORM, ET Al., - Appellants,

versus

PHILIP M. KLUTZNICK, Et Al., - - Appellees.

On Appeal From The United States District Court For The District Of Columbia

---

Brief of the Commonwealth of Kentucky on Relation of Steven L. Beshear, Its Attorney General, Joined by the State of West Virginia on Relation of Chauncey H. Browning, Its Attorney General, as Amicus Curiae in Support of Appellants' Jurisdictional Statement

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INTRODUCTION — INTEREST OF AMICUS CURIAE

The Commonwealth of Kentucky on relation of its Attorney General, submits this brief in support of appellants' jurisdictional statement pursuant to Supreme Court Rule 42(1)(4) which permits the filing of such a brief by a state Attorney General without the consent of the parties. Amicus curiae Common-

wealth of Kentucky believes the issues presented by appellant in its jurisdictional statement are of such a magnitude that a definitive statement by the court is needed to protect the substantial interests of the citizens of the Commonwealth and the United States. The State of West Virginia on relation of its Attorney General joins the Commonwealth of Kentucky in submitting this brief.

STATEMENT OF THE CASE

The plaintiffs, Federation for American Immigration Reform, The Honorable Walter D. Huddleston, member of the United States Senate representing Kentucky and others, filed their complaint in the United States District Court for the District of Columbia alleging that their constitutional rights were being abridged by the method and manner by which the Decennial Census for 1980 (hereinafter Census) was to be conducted. They noted that the apportionment of representatives to the United States House of Representatives and the distribution of federal funds would flow from the tabulations of the Census Bureau. More specifically, plaintiffs alleged that through a concerted effort on its part the Census Bureau intended to include in the Census a large concentration of individuals who had entered or remained in this country unlawfully and who will be referred to in this Brief as "illegal aliens."

Flowing from the report of the Census to the President is the apportionment of representatives to

the United States House of Representatives, the number of Presidential Electors each state is entitled to appoint, as well as federal funds that are distributed from more than 100 Federal assistance programs. Intrastate reapportionment also flows from the Census in many states.

Illegal aliens are primarily congregated in the major areas of our ten most populous states — California, New York, Texas, Pennsylvania, Illinois, Ohio, Michigan, New Jersey, Florida and Massachusetts. (Affidavit of Lance Tarrance submitted to the District Court). The Census Bureau has made a "major effort" to include "illegal aliens" in the 1980 Census Bureau report. The Census Bureau will include these illegal aliens in its report without any differentiation between them and citizens and lawful aliens in this country. Since there are between three and eight million illegal aliens in the United States, including these illegal aliens in the Census tabulation will have a "significant" impact on legislative and fiscal apportionments flowing from the 1980 census. (Tarrance affidavit, *id.*) Inclusion of such illegal aliens in the Census report will therefore have an adverse effect on the citizens of the various states, including Kentucky, with a small illegal alien population.

Appellants therefore asked the District Court for relief by enjoining the taking of the Census and/or the promulgation or use of the tabulations and other data derived therefrom in a manner repugnant to and violative of the Constitution and laws of the United States. Plaintiffs also asked for a Declaratory Judgment, de-

claring that the method employed in the taking of the Census and/or the use of the tabulations and other data derived therefrom is repugnant to and violative of the Constitution and laws of the United States and is arbitrary, capricious and abusive of the discretion conferred upon the Director of the Census and other defendants. The District Court declined to grant appellants the relief to which they were entitled and this appeal followed. It is the position of Amicus Curiae that relief should be granted from the effect of this improper manner of Census taking.

ARGUMENT

THE QUESTIONS INVOLVED IN THIS APPEAL ARE SUBSTANTIAL.

The most apparent inequities flowing from this improper method of taking the Census will be the following:

1. Representatives to the United States House of Representatives will be apportioned on the basis of incorrect census data. Thus individuals in states and areas with a large distribution of illegal aliens will receive disproportionate representation before the Congress of the United States.

2. The apportionment of Presidential Electors will give states with a large distribution of illegal aliens an unconstitutional advantage over areas with little or no illegal alien population.

3. Reapportionment of state legislatures in states with a large population of illegal aliens will be disproportionate.

4. Funds flowing from Federal programs will be unequally distributed.

A. Apportionment of Representatives to Congress

The Fourteenth Amendment to the U. S. Constitution states in part:

> Section 2: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of *persons* in each State, excluding Indians not taxed. . ." (Emphasis added.)

Under no stretch of the imagination could the framers of the constitution or the ratifiers of the Fourteenth Amendment have meant to include fugitives from justice who have entered this country illegally in the term "persons."

If a state law which counts votes of citizens in one part of the state disproportionately to citizens in another part of the state is unconstitutional, it is obvious that a census which causes disproportionate representation in the United States Congress is unconstitutional. *Reynolds* v. *Sims,* 377 U. S. 533, 12 L. Ed. 506, 84 S. Ct., 1362 (1964). The obvious inequities of the effects of including illegal aliens in the Census demands review by this court.

B. Disproportionate Presidential Elections

The arguments evidencing the need for review by this Court to avoid disproportionate representation in the United States Congress apply equally well in

arguing that the inequities in selecting a President, flowing from the taking of the Census, require review. In both examples the principals are the same. A person should not have his representation or vote diminished because of the encroachment of illegal aliens.

C. Reapportionment of State Legislatures

Since Kentucky has very few, if any, illegal aliens within its borders, this issue will not directly affect Amicus Curiae. The arguments concerning "one man, one vote" and the apportionment of the United States Congress again point to this obvious inequity.

D. Unequal Distribution of Federal Funds

Citizens of Kentucky pay into the United States Treasury a portion of their income and other taxes. In return, they are entitled pursuant to certain federal statutes to the return of some tax dollars under the more than 100 federal programs. To allow a disproportionate advantage to states and the citizens thereof with large illegal alien populations creates the unconstitutional taking of property without due process of law. (Sec. 1 of the Fourteenth Amendment of the United States Constitution).

IMPORTANCE OF THE QUESTIONS INVOLVED.

The taking of the Census affects each and every citizen of the United States. It is imperative that the Census tabulations follow constitutional guidelines.

There is, however, a paucity of cases setting forth the constitutional standards. A mistake in the method of census enumeration can adversely or disproportionately affect the quality of lives of the "persons" of the United States. Accepting jurisdiction in this case is therefore of vital concern to all citizens of the United States.

CONCLUSION

It is constitutionally unlawful as well as obviously inequitable for the Census Bureau to cause the harmful effects enumerated in this brief as a result of including illegal aliens in the 1980 Census count. Because of the uniqueness of the questions presented and the sweeping effect of a decision in this case, the Court should note probable jurisdiction.

Respectfully submitted,

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PROOF OF SERVICE

I, Robert V. Bullock, a member of the bar of the Supreme Court, do hereby certify that, pursuant to Rules 33(1) and (2) (a) of the Rules of the Supreme Court, three copies of Brief of Amicus Curiae in support of appellants' Jurisdictional Statement were served this 29th day of May, 1980, by mail, upon counsel of record for all parties in this proceeding, as follows:

1. Upon George J. Weiner, Schmeltzer, Aptaker & Sheppard, P.C., Suite 500, 1900 Massachusetts Avenue, N.W., Washington, D.C. 20036, Counsel for Appellants;

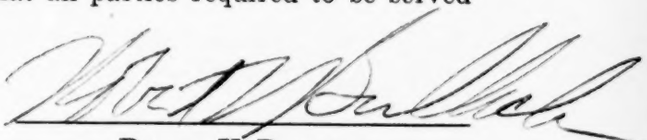
2. Upon Wade H. McCree, Solicitor General of the United States and counsel of record for Appellees Klutznick, et al., by mailing copies addressed to him at the Office of the Solicitor General of the United States, U. S. Department of Justice, Room 5143, 10th & Constitution Avenue, N.W., Washington, D.C. 20530;

3. Upon Daniel K. Mayers and John Payton, counsel of record for Intervenor-Appellees the State of New York, et al., by copies addressed to them at the offices of Wilmer & Pickering, 1666 K Street, N.W., Washington, D.C. 20006;

4. Upon Paul S. Ryerson and Mark L. Perlis, counsel of record for Amicus Curiae, the Mexican-American Legal Defense and Educational Fund, in the proceeding below, by copies addressed to them at the offices of Arnold & Porter, 1229 - 19th Street, N.W., Washington, D.C. 20036; and

5. Upon Benson Scotch, Assistant Attorney General, State of Vermont, counsel of record for applicant Amicus Curiae, the State of Vermont, in the proceeding below, by mailing said copies, postage prepaid, to him at the Office of the Attorney General, State of Vermont, Pavilion Building, Second Floor, Montpelier, Vermont 05602.

I further certify that all parties required to be served have been served.



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